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Provisional text

JUDGMENT OF THE COURT (First Chamber)

10 April 2025 (*)

(Reference for a preliminary ruling – Citizenship of the Union – Directive 2004/38/EC – Right of citizens of the Union and their family members to move and reside freely within the territory of the Member States – Article 3 – Beneficiaries – Article 2(2)(d) – Family member – Direct relative in the ascending line of the partner of a Union citizen who is dependent on that Union citizen and/or that partner – Assessment of the condition of being ‘dependent’ – Relevant date for determining material dependence – Article 10 – Conditions for the issue of a residence card – Declaratory nature of a residence card – Submission of an application for a residence card in the host Member State several years after leaving the country of origin – Effect of a situation of illegal residence under national legislation on the assessment of the condition of being ‘dependent’)

In Case C607/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the Conseil d’État (Council of State, Belgium), made by decision of 14 September 2021, received at the Court on 30 September 2021, in the proceedings

XXX

v

État belge,

THE COURT (First Chamber),

composed of K. Lenaerts, President of the Court, acting as President of the First Chamber, T. von Danwitz, Vice-President of the Court, acting as Judge of the First Chamber, A. Kumin (Rapporteur), M. Gavalec and I. Ziemele, Judges,

Advocate General: T. Ćapeta,

Registrar: M. Siekierzyńska, Administrator,

having regard to the written procedure and further to the hearing on 13 June 2024,

after considering the observations submitted on behalf of:

- XXX, by S. Janssens and P. Vanwelde, *avocats*,
- the Belgian Government, by M. Jacobs, C. Pochet and M. Van Regemorter, acting as Agents, and by E. Derriks and K. de Haes, *avocats*,
- the Czech Government, by A. Edelmannová, M. Smolek and J. Vlácil, acting as Agents,
- the Danish Government, by M. Jespersen, V. Pasternak Jørgensen, M. Søndahl Wolff and Y. Thyregod Kollberg, acting as Agents,
- the German Government, by J. Möller and R. Kanitz, acting as Agents,
- the European Commission, by A. Azéma, F. Blanc and E. Montaguti, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 19 September 2024,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 2(2)(d) 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; OJ 2005 L 197, p. 34, and OJ 2007 L 204, p. 28).

2 The request has been made in proceedings between XXX and the État belge (Belgian State) concerning the rejection of an application for a residence card submitted as a family member of a Union citizen.

Legal context

European Union law

3 According to recitals 5, 10, 13, 14, 17 and 18 of Directive 2004/38:

‘(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. For the purposes of this Directive, the definition of “family member” should also include the registered partner if the legislation of the host Member State treats registered partnership as equivalent to marriage.

...

(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.

...

(13) The residence card requirement should be restricted to family members of Union citizens who are not nationals of a Member State for periods of residence of longer than three months.

(14) The supporting documents required by the competent authorities for the issuing of a registration certificate or of a residence card should be comprehensively specified in order to avoid divergent administrative practices or interpretations constituting an undue obstacle to the exercise of the right of residence by Union citizens and their family members.

...

(17) Enjoyment of permanent residence by Union citizens who have chosen to settle long term in the host Member State would strengthen the feeling of Union citizenship and is a key element in promoting social cohesion, which is one of the fundamental objectives of the Union. A right of permanent residence should therefore be laid down for all Union citizens and their family members who have resided in the host Member State in compliance with the conditions laid down in this Directive during a continuous period of five years without becoming subject to an expulsion measure.

(18) In order to be a genuine vehicle for integration into the society of the host Member State in which the Union citizen resides, the right of permanent residence, once obtained, should not be subject to any conditions.'

4 Article 2 of that directive states:

'For the purposes of this Directive:

...

(2) "family member" means:

...

(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;

...

(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 the said directive 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;

...'

6 Article 7 of Directive 2004/38 provides, in paragraphs 1 to 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).'

7 According to Article 9(1) and (2) of that directive:

- '1. Member States shall issue a residence card to family members of a Union citizen who are not nationals of a Member State, where the planned period of residence is for more than three months.
- 2. The deadline for submitting the residence card application may not be less than three months from the date of arrival.'

8 Article 10 of the said directive states:

- '1. The right of residence of family members of a Union citizen who are not nationals of a Member State shall be evidenced by the issuing of a document called "Residence card of a family member of a Union citizen" no later than six months from the date on which they submit the application. A certificate of application for the residence card shall be issued immediately.
- 2. For the residence card to be issued, Member States shall require presentation of the following documents:
 - (a) a valid passport;
 - (b) a document attesting to the existence of a family relationship or of a registered partnership;
 - (c) the registration certificate or, in the absence of a registration system, any other proof of residence in the host Member State of the Union citizen whom they are accompanying or joining;
 - (d) in the cases falling under points (c) and (d) of Article 2(2), documentary evidence that the conditions laid down therein are met;

...'

9 Article 14 of Directive 2004/38 provides, in paragraph 2 thereof:

'Union citizens and their family members shall have the right of residence provided for in Articles 7, 12 and 13 as long as they meet the conditions set out therein.

In specific cases where there is a reasonable doubt as to whether a Union citizen or his/her family members satisfies the conditions set out in Articles 7, 12 and 13, Member States may verify if these conditions are fulfilled. This verification shall not be carried out systematically.'

10 According to Article 15(1) of that directive:

'The procedures provided for by Articles 30 and 31 shall apply by analogy to all decisions restricting free movement of Union citizens and their family members on grounds other than public policy, public security or public health.'

11 Article 16(1) and (2) of the said directive provides:

'1. Union citizens who have resided legally for a continuous period of five years in the host Member State shall have the right of permanent residence there. This right shall not be subject to the conditions provided for in Chapter III.

2. Paragraph 1 shall apply also to family members who are not nationals of a Member State and have legally resided with the Union citizen in the host Member State for a continuous period of five years.'

Belgian law

12 Article 40a 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 facts in the main proceedings ('the Law of 15 December 1980'), provides:

'§ 1. Without prejudice to more favourable provisions contained in European laws or regulations on which the family members of the Union citizen may rely, the following provisions shall apply to them.

§ 2. The following shall be regarded as family members of a Union citizen:

...

4° the relatives in the ascending line and the relatives in the ascending line of his or her spouse or partner referred to in [points] 1° or 2°, who are dependent on them, who accompany them or join them;

...'

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

13 XXX, of Moroccan nationality, is the mother of a Belgian national who lives in Belgium with his partner Ms N.E.K., who is a Netherlands national and who made a declaration of cohabitation with XXX's son before the civil registrar of Anderlecht (Belgium) on 11 February 2005.

14 XXX entered the Belgian territory on 25 July 2011, holding a passport bearing a visa issued by the Netherlands authorities, valid until 14 October 2011.

15 On 21 September 2011, she submitted to the Belgian authorities an application for a residence card as a direct dependent relative in the ascending line of her son.

16 That application was rejected by the Belgian State on the ground that, following an amendment, Belgian legislation no longer provided for family reunification for direct relatives in the ascending line of persons with Belgian nationality.

17 On 26 June 2015, XXX submitted a second application for a residence card, but this time as a family member of Ms N.E.K.

18 It is apparent from the documents before the Court that that application was rejected by the Belgian State on the ground, first, that XXX had not provided evidence that the family members being joined had sufficient resources to support her and, second, that the documents produced to demonstrate the existence of a current relationship of dependency between XXX and those family members were too old to be taken into consideration. That rejection was accompanied by an order to leave the Belgian territory. Moreover, by a judgment of 14 April 2016, the Conseil du contentieux des étrangers (Council for Asylum and Immigration Proceedings, Belgium), relying solely on the first of those grounds, confirmed that rejection as well as that order to leave the Belgian territory.

19 On 9 November 2017, XXX submitted a third application for a residence card, again relying on her status as a family member of Ms N.E.K.

20 That application was also rejected by the Belgian State, which relied, in that regard, *inter alia*, on the second of the grounds referred to in paragraph 18 of the present judgment. In fact, the documents produced as proof of XXX's lack of means all dated from 2011. Likewise, the documents produced as proof of the financial assistance provided by the household being joined related to the years 2010 and 2011. Therefore, those documents were all too old to establish that XXX had been supported by that household in her country of origin before that application was submitted.

21 By judgment of 30 August 2019, the Conseil du contentieux des étrangers (Council for Asylum and Immigration Proceedings) dismissed the action brought by XXX against the rejection of that application, *inter alia* relying on the clarifications provided by the Court in its judgment of 9 January 2007, *Jia* (C1/05, EU:C:2007:1), as to the concept of 'dependant'. According to that national court, the direct relative in the ascending line must show that he or she was dependent on the Union citizen in the country from which he or she comes, at the time when he or she applied to join that citizen. It follows that it does not suffice, in order to be able to find that that relative in the ascending line is dependent on the family member who is being joined, that that family member have sufficient resources or live with the said relative in the ascending line. The direct relative in the ascending line must establish that material support of the family member being joined was necessary for him or her at the time of his or her application for a residence card. The documents produced by XXX as proof of her lack of means or of the financial assistance of the household being joined tend to prove that her alleged financial dependence on the household being joined existed in 2010 and 2011, whereas the application for a residence card was submitted on 9 November 2017, that is to say, six or seven years later. Accordingly, those documents are too old to establish that XXX was dependent on the household being joined at the date of that application.

22 XXX brought an action before the Conseil d'État (Council of State, Belgium), which is the referring court, seeking to have the judgment of 30 August 2019 set aside. In support of her action, XXX submits, *inter alia*, that that judgment disregards the concept of 'dependent' within the meaning of Article 2(2)(d) of Directive 2004/38, as well as Article 7(2) and Article 10(2)(d) thereof.

23 The referring court notes that the Court's interpretation of that concept does not allow it to be determined whether it applies in a situation in which, on the one hand, the person applying for a right of residence was for many years already in the territory of the Member State in which the Union citizen being joined is established and, on the other hand, that person had already submitted, since her arrival in that territory, several residence card applications which had not been met with success. That court asks

whether, in such a situation, during the examination of a new residence card application, the requirement that the family member be ‘dependent’ should be assessed by taking into account the situation existing on the date of the submission of that new application or, on the contrary, by taking into account the situation prior to that application, namely that existing in the country of origin before the said person joined the Union citizen in the territory of the host Member State.

24 It is in that context that the Conseil d’État (Council of State) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) In the context of the examination of the concept of a dependant for the purposes of Article 2(2)(d) of Directive [2004/38], should account be taken of the situation of an applicant who is already in the territory of the State in which the sponsor is established?

(2) If the answer to the first question is in the affirmative, should an applicant who is lawfully in the territory of that State be treated differently from an applicant who is there unlawfully?

(3) Is Article 2(2)(d) of Directive [2004/38] to be interpreted as meaning that, in order to be regarded as a dependant and thus to fall within the definition of “family member” referred to in that provision, a direct relative in the ascending line [may] rely on a situation of real material dependence in the country of origin established by documents which, at the time of lodging the application for a residence card as a family member of a Union citizen, were, however, issued several years previously, on the ground that the departure from the country of origin and the lodging of the application for a residence card in the host Member State did not occur at the same time?

(4) If the answer to the third question is in the negative, what are the criteria for assessing the situation of material dependence of an applicant seeking to join a European citizen or his or her partner, as a relative in the ascending line, without having been able to obtain a residence permit on the basis of an application lodged immediately after his or her departure from the country of origin?’

Procedure before the Court

25 By decision of the President of the Court of 28 October 2022, the proceedings in the present case were stayed, pursuant to Article 55(1)(b) of the Rules of Procedure of the Court of Justice, pending the final decision in Case C488/21.

26 Following the delivery of the judgment of 21 December 2023, *Chief Appeals Officer and Others* (C488/21, EU:C:2023:1013), the Court sent the referring court in the present case a copy of that judgment and asked it whether, in the light of that judgment, it wished to maintain or withdraw its questions referred for a preliminary ruling. By letter of 19 January 2024, that court replied to the Court that it wished to maintain all of its questions.

Consideration of the questions referred

First and third questions

27 By its first and third questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 2(2)(d) of Directive 2004/38 must be interpreted as meaning that, in order to determine whether the direct relative in the ascending line of the partner of a Union citizen is dependent on that Union citizen and/or that partner, the competent national authority must take into account the situation of that relative in the ascending line in his or her country of origin on the date on which he or she left that country and joined the said Union citizen in the host Member State, where appropriate on the basis of documents issued before that date, or the situation of that relative in the ascending line in that Member State on the date on which an application for a residence card was submitted, if several years have elapsed between those two dates.

28 As a preliminary point, it should be noted that, during the proceedings before the Court, the German Government expressed doubts as to the applicability of Directive 2004/38 in a situation in which a third-country national, such as XXX, joins the partner of her son and the son, both Union citizens, in a Member State of which the son, but not his partner, is a national.

29 In that regard, it should be borne in mind that, under Article 3(1) thereof, 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 the said directive who accompany or join them.

30 Article 2(2)(d) of the same directive provides that, for the purposes of the application of that directive, 'dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b)' are to be regarded as family members.

31 Thus, according to Article 2(2)(d), read in conjunction with Article 3(1) of Directive 2004/38, the dependent direct relatives in the ascending line of the partner of a Union citizen residing in a Member State other than that of which he or she is a national must be regarded, for the purposes of the application of the rights guaranteed by that directive, in particular of a right of residence for more than three months provided for in Article 7(2) of that directive, as being the family members of a Union citizen, provided that the registered partnership meets the criteria referred to in Article 2(2)(b) of the same directive.

32 In the case at hand, the referring court seems to start from the premiss according to which the declaration of cohabitation, made by the son of XXX and Ms N.E.K. in 2005 before the civil registrar of Anderlecht, constitutes the conclusion, under Belgian law, of a partnership which satisfies the conditions of Article 2(2)(b) of Directive 2004/38.

33 Accordingly, in so far as XXX, the direct relative in the ascending line of the partner of a Union citizen residing in a Member State other than that of which she is a national, is able to demonstrate that she is a dependant of the household being joined, within the meaning of Article 2(2)(d) of Directive 2004/38, she may avail herself of the rights guaranteed by that directive and, in particular, of a right of residence for more than three months under Article 7(2) of that directive, provided that that Union citizen satisfies the conditions set out in Article 7(1)(a), (b) or (c) of the same directive.

34 Directive 2004/38 is therefore applicable to a situation such as that referred to in paragraph 28 of the present judgment.

35 So far as concerns the first and third questions referred, as reformulated in paragraph 27 of the present judgment, and, in particular, the date on which the condition that the direct relative in the ascending line of the partner of a Union citizen must be dependent on that Union citizen and/or that partner, set out in Article 2(2)(d) of Directive 2004/38, must be assessed, it follows from the Court's settled case-law that the situation of dependence must exist, in the country from which that relative in the ascending line comes, at the date on which he or she applies to join that partner and that Union citizen see, to that effect, judgments of 9 January 2007, *Jia*, C1/05, EU:C:2007:1, paragraph 37, and of 16 January 2014, *Reyes*, C423/12, EU:C:2014:16, paragraphs 22 and 30).

36 However, that case-law was handed down in relation to situations in which the submission of the residence permit application by the third-country national and the arrival of that national in the territory of the host Member State had taken place at the same time, in that that application had been submitted a few days or a few months after that arrival.

37 In those circumstances, as the Advocate General emphasised, in essence, in point 63 of her Opinion, the reference to the country of origin in the cases which gave rise to that case-law was motivated by the fact that the authorities which decided whether to issue a residence permit could look only into the period prior to the relocation to the host Member State in order to assess whether the persons concerned were

dependent on a Union citizen. Therefore, in view of the factual situations at issue in those cases, the place of assessment of the situation of dependence, at the time when the residence permit applications were submitted, could only be the sole country of origin in which the persons concerned had been living before joining the Union citizen.

38 Accordingly, that same case-law cannot be automatically transposed to a factual situation in which several years have elapsed between the departure of the third-country national from his or her country of origin and that national's application for a residence card.

39 Regarding such a situation, it should be noted, in the first place, that, according to Article 10(1) of Directive 2004/38, the right of residence of family members of a Union citizen who are not nationals of a Member State is to be evidenced by the issuing of a document called 'Residence card of a family member of a Union citizen', which the Member States are required to issue no later than six months from the date on which they submit the application.

40 In addition, Article 10(2) of that directive, which sets out exhaustively the documents intended for establishing, in particular, the status of 'family member', within the meaning of the said directive, provides, in point (d) thereof, that a third-country national, in order to demonstrate that he or she has that status and, therefore, to obtain a residence card, must present documentary evidence that the conditions set out in Article 2(2)(c) and (d) of that directive are satisfied, namely, in the case referred to in point (d) of that provision, that he or she is a direct relative in the ascending line of a Union citizen and/or of the partner of that citizen.

41 In that context, it should be pointed out that the Court has made clear that the issuing of a residence card, such as that referred to in Article 10(1) of Directive 2004/38, to a third-country national, must be regarded not as a measure giving rise to rights, but as a measure by a Member State serving to prove the individual position of such a national in light of the provisions of EU law (judgment of 27 June 2018, *Diallo*, C246/17, EU:C:2018:499, paragraph 48 and the case-law cited).

42 The declaratory character of residence cards means that those permits merely certify that a right already exists for the person concerned (judgment of 27 June 2018, *Diallo*, C246/17, EU:C:2018:499, paragraph 49 and the case-law cited) and is acquired independently of the issue of such a card by the competent authority of a Member State (see, to that effect, judgment of 8 April 1976, *Royer*, 48/75, EU:C:1976:57, paragraph 32).

43 Thus, in the context of the administrative procedure provided for in Article 10 of Directive 2004/38, the competent national authority must provide a residence card to the applicant, a third-country national, after having verified that he or she qualifies for a right of residence for more than three months under Article 7(2) of that directive, in particular that he or she falls within the concept of 'family member' within the meaning of that directive.

44 If the competent national authority, however, when examining the application for a residence card, did not verify that the direct relative in the ascending line of the partner of a Union citizen, who physically joined that partner in the host Member State a few years before the submission of that application, is, at the time that that application is submitted, dependent on that Union citizen and/or partner, within the meaning of Article 2(2)(d) of Directive 2004/38, there is a risk that that relative in the ascending line will be granted, in accordance with Article 10 of that directive, a residence card, even though he or she does not satisfy the conditions provided for in Article 7(2) of the said directive for entitlement to a right of residence for more than three months and thus to such a residence card (see, to that effect, judgment of 21 December 2023, *Chief Appeals Officer and Others*, C488/21, EU:C:2023:1013, paragraphs 60 and 62).

45 It follows from the foregoing that, when submitting the residence card application, the third-country national must demonstrate that he or she falls within that concept and thus, in a situation such as that in the main proceedings, that he or she has the status of ‘dependent direct relative in the ascending line’, within the meaning of Article 2(2)(d) of Directive 2004/38.

46 In the second place, it is appropriate to find that, in a situation in which the direct relative in the ascending line of the partner of a Union citizen submits a residence card application, under Article 7(2) and Article 10 of Directive 2004/38, several years after having physically joined the Union citizen and that citizen’s partner in the host Member State, that relative in the ascending line must furnish proof, first, that he or she is dependent on that citizen and/or that partner in that Member State on the date of submission of that application and, second, that he or she was dependent on that citizen and/or that partner, in his or her country of origin, on the date of his or her arrival in the territory of that Member State.

47 In that regard, it should be recalled that, according to the Court’s established case-law, not all third-country nationals derive rights of entry into and residence in a Member State from Directive 2004/38, but only those who are a ‘family member’, within the meaning of Article 2(2) of that directive, of a Union citizen who has exercised his right of freedom of movement by becoming established in a Member State other than the Member State of which he is a national (judgment of 27 June 2018, *Diallo*, C246/17, EU:C:2018:499, paragraph 53 and the case-law cited).

48 Accordingly, as has been recalled in paragraphs 29 and 31 of the present judgment, the very applicability of Directive 2004/38 and, consequently, the application of the rights guaranteed by that directive, in particular the right of entry, under Article 5 of Directive 2004/38, and the right of residence for more than three months, under Article 7(2) thereof, are subject, for the third-country national wishing to join a Union citizen and the partner of that citizen, inter alia to the condition that that national have the status of ‘family member’, within the meaning of Article 2(2) of that directive, which means that the direct relatives in the ascending line must be dependent on that Union citizen and/or that partner.

49 If the review, by the competent national authority, of the condition relating to the relationship of dependency were limited to the situation of the direct relative in the ascending line in the host Member State on the date of submission of the application for a residence card, that relative in the ascending line could be provided with such a card, even though, on the date on which he or she physically joined the Union citizen, he or she did not satisfy the conditions necessary to qualify for a right of residence for more than three months, which, moreover, would run counter to the objectives pursued by Directive 2004/38.

50 In that regard, it should be recalled 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 to strengthen that right. Recital 5 of the directive states that that right should, if it is to be exercised under objective conditions of dignity, be also granted to the family members of those citizens, irrespective of nationality (judgment of 14 November 2017 *Lounes*, C165/16, EU:C:2017:862, paragraph 31 and the case-law cited).

51 Directive 2004/38 does not however confer any autonomous right on family members of a Union citizen who are third-country nationals. Thus, any rights that may be conferred on those nationals by the directive are derived from the rights which the Union citizen concerned enjoys as a result of having exercised his freedom of movement (judgment of 14 November 2017 *Lounes*, C165/16, EU:C:2017:862, paragraph 32 and the case-law cited).

52 In that context, it should also be recalled that the condition, referred to in Article 2(2)(d) of Directive 2004/38, that the direct relative in the ascending line must be dependent on the Union citizen and/or the partner of that citizen was not included in the Proposal for a Directive of the European Parliament and of the Council 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) (OJ 2001 C 279 E, p. 150), presented by the European Commission. That condition was added during the legislative procedure, which shows that the EU legislature had intended to limit the benefit of the rights provided for by Directive 2004/38 to a specific category of direct relatives in the ascending line, namely only those who are dependent on the Union citizen and/or the partner of that citizen.

53 If, however, the fact that the direct relative in the ascending line of the partner of a Union citizen submitted an application for a residence card several years after joining that Union citizen in the host Member State meant that, when processing that application, the competent national authority no longer had to verify the existence of a situation of dependence, referred to in Article 2(2)(d) of Directive 2004/38, in the country from which that relative in the ascending line comes, whereas, in accordance with the case-law cited in paragraph 35 of the present judgment, that verification would be required if that application had been submitted at the same time as the arrival of that relative in the ascending line in the territory of that Member State, there would be not only the risk of an increase in the number of potential beneficiaries of the rights conferred by that directive, thereby contravening the intention expressed by the EU legislature, but also the risk of circumventing the requirements set by the said directive.

54 However, those risks do not exist where the direct relative in the ascending line in question entered the territory of the host Member State and resided there initially on the basis of a right of residence, autonomous or derived, which could be granted under EU law under a provision other than Article 7(2) of Directive 2004/38, or indeed under national law. Accordingly, in such a situation, it is sufficient for that relative in the ascending line to prove that he or she is dependent on the Union citizen and/or the partner of that citizen in that Member State on the date on which his or her application for a residence card is submitted, pursuant to Article 10 of that directive.

55 In the third place, it should be recalled that, so far as concerns the means of acceptable proof by which the person concerned can establish that he or she has the status of ‘dependent direct relative in the ascending line’, within the meaning of Article 2(2)(d) of Directive 2004/38, Article 10(2)(d) thereof merely states that, for the residence card to be issued, Member States must request documentary evidence that the conditions set out in that Article 2(2)(d), thus including the condition relating to the relationship of dependency, are satisfied.

56 Given the lack of precision as to the means of acceptable proof by which the person concerned can establish that he is a ‘dependent direct relative in the ascending line’ within the meaning of Article 2(2)(d) of Directive 2004/38, it must be held that such proof may be adduced by any appropriate means (see, by analogy, judgment of 9 January 2007, *Jia*, C1/05, EU:C:2007:1, paragraph 41 and the case-law cited).

57 In that regard, it must be specified that a document of the competent authority of the country of origin or the country from which the applicant came attesting to the existence of a situation of dependence, albeit appearing particularly appropriate for that purpose, cannot constitute a condition for the issue of a residence permit, while a mere undertaking from the Union citizen or his or her partner to support the family member concerned need not be regarded as establishing the existence of that family member’s situation of real dependence (see, to that effect, judgment of 9 January 2007, *Jia*, C1/05, EU:C:2007:1, paragraph 42 and the case-law cited).

58 It follows from the foregoing that, in a situation in which the application for a residence card is submitted several years after the direct relative in the ascending line of the partner of a Union citizen joined that partner in the host Member State, that direct relative in the ascending line, in order to demonstrate that he or she has the status of ‘family member’ within the meaning of Article 2(2)(d) of Directive 2004/38 – and, therefore, in order to qualify for a derived right of residence, in accordance with Article 7(2) of that directive – must be able to produce, in support of that application, inter alia, documents issued in the past attesting to the existence of a situation of dependence in his or her country of origin on

the date on which he or she physically joined that Union citizen and that partner. Those documents cannot be deemed too old.

59 In the light of all the foregoing considerations, the answer to the first and third questions is that Article 2(2)(d) of Directive 2004/38, read in conjunction with Article 7(2) and Article 10 thereof, must be interpreted as meaning that, in order to determine whether the direct relative in the ascending line of the partner of a Union citizen is dependent on that Union citizen and/or that partner, the competent national authority must take into account both the situation of that relative in the ascending line in his or her country of origin on the date on which he or she left that country and joined the said Union citizen in the host Member State, where appropriate on the basis of documents issued before that date, or the situation of that relative in the ascending line in that Member State on the date on which an application for a residence card was submitted, if several years have elapsed between those two dates.

Second question

60 It is apparent from the order for reference that the residence card application submitted by XXX to the competent Belgian authority on 26 June 2015 was rejected on 28 September 2015. The decision to refuse residence was accompanied by an order to leave the Belgian territory. Thus, in so far as that order has not been executed, XXX has been residing, since that refusal decision, which was confirmed by a judgment of the Conseil du contentieux des étrangers (Council for Asylum and Immigration Proceedings) of 14 April 2016, illegally in that territory.

61 It is in the light of those circumstances that, by its second question, which is raised in the event that the competent national authority of the host Member State must, when examining the residence card application, submitted in accordance with Article 7(2) and Article 10 of Directive 2004/38, and, in particular, in order to determine whether the condition relating to the relationship of dependency referred to in Article 2(2)(d) of that directive is satisfied, take account of the applicant's situation in that Member State, the referring court asks, in essence, whether the fact that that applicant is residing illegally in the territory of that Member State, in the light of national legislation, has a bearing on the assessment of that condition.

62 In that regard, it should be noted that Directive 2004/38 does not make the status of 'family member', within the meaning of Article 2(2)(d) of that directive, dependent on a condition of 'legal residence' in the host Member State. Thus, the definition of family members which is contained in that provision makes no distinction according to whether or not they have already resided legally, pursuant to national legislation, in the host Member State.

63 By contrast, as has been indicated in paragraph 48 of the present judgment, it is the relationship of dependency – referred to, in essence, in Article 2(2)(d) of Directive 2004/38 – which determines, for direct relatives in the ascending line, the applicability of that directive and constitutes one of the conditions which must be satisfied in order to be able to avail of the rights guaranteed by it, in particular of a right of residence for more than three months in accordance with Article 7(2) of that directive.

64 As is apparent from the answer given to the first and third questions, where, first, a direct relative in the ascending line of the partner of a Union citizen can demonstrate that he or she is, both on the date of his or her residence card application, submitted several years after his or her arrival in the host Member State, and on the date of that arrival, dependent on that Union citizen and/or that partner, and, second, that Union citizen satisfies the conditions set out in Article 7 of Directive 2004/38, that direct relative in the ascending line enjoys a derived right of residence, for more than three months, under Article 7(2) of that directive, evidenced by the issue of a residence card.

65 It follows that, where the material conditions for such a right of residence laid down in Directive 2004/38, in particular the condition relating to the existence of a relationship of dependence, are fulfilled on the relevant dates referred to in the preceding paragraph of the present judgment, that right of residence cannot be refused on the ground that, pursuant to national legislation, the said direct relative in the ascending line resides, on the date of his or her residence card application, illegally in the territory of the Member State in which the Union citizen being joined and the partner of that citizen are established.

66 In the light of the foregoing considerations, the answer to the second question is that Article 7(2) of Directive 2004/38, read in conjunction with Article 2(2)(d) and Article 10 thereof, must be interpreted as meaning that a direct relative in the ascending line of the partner of a Union citizen who is able to demonstrate that he or she is, both on the date of his or her residence card application, submitted several years after his or her arrival in the host Member State, and on the date of that arrival, dependent on that Union citizen and/or that partner, enjoys a right of residence derived from the rights enjoyed by a Union citizen, for more than three months, evidenced by the issue of a residence card, if that Union citizen satisfies the conditions set out in Article 7 of that directive. That right of residence cannot be refused on the ground that, under national legislation, that relative in the ascending line resides, on the date of that application, illegally in the territory of that Member State.

Fourth question

67 By its fourth question, the referring court asks the Court, in essence, to determine the criteria for assessing whether a direct relative in the ascending line of the partner of a Union citizen is materially dependent on that Union citizen and/or that partner, in a situation in which the resident card application is submitted several years after that relative in the ascending line physically joined the said Union citizen in the host Member State.

68 That question is raised in the event that Article 2(2)(d) of Directive 2004/38 should be interpreted as meaning that a direct relative in the ascending line cannot, in order to demonstrate that he or she is dependent on a Union citizen whom he or she is joining and/or the partner of that citizen, rely on documents issued in his or her country of origin attesting to the existence of a relationship of dependency, on the ground that those documents are too old to establish, on the date of submission of the residence card application, the existence of a relationship of dependency in his or her country of origin.

69 It follows from paragraphs 58 and 59 of the present judgment, however, that such a relative in the ascending line, in order to demonstrate that he or she is dependent on the Union citizen whom he or she is joining and/or the partner of that citizen, may rely on such documents in support of his or her residence card application.

70 Consequently, there is no need to answer the fourth question.

Costs

71 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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 (First Chamber) hereby rules:

1. **Article 2(2)(d) 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, read in conjunction with Article 7(2) and Article 10 of that directive,**

must be interpreted as meaning that, in order to determine whether the direct relative in the ascending line of the partner of a Union citizen is dependent on that Union citizen and/or that partner, the competent national authority must take into account both the situation of that relative in the ascending line in his or her country of origin on the date on which he or she left that country and joined the said Union citizen in the host Member State, where appropriate on the basis of documents issued before that date, or the situation of that relative in the ascending line in that Member State on the date on which an application for a residence card was submitted, if several years have elapsed between those two dates.

2. Article 7(2) of Directive 2004/38, read in conjunction with Article 2(2)(d) and Article 10 thereof,

must be interpreted as meaning that a direct relative in the ascending line of the partner of a Union citizen who is able to demonstrate that he or she is, both on the date of his or her residence card application, submitted several years after his or her arrival in the host Member State, and on the date of that arrival, dependent on that Union citizen and/or that partner, enjoys a right of residence derived from the rights enjoyed by a Union citizen, for more than three months, evidenced by the issue of a residence card, if that Union citizen satisfies the conditions set out in Article 7 of that directive. That right of residence cannot be refused on the ground that, under national legislation, that relative in the ascending line resides, on the date of that application, illegally in the territory of that Member State.

[Signatures]

* Language of the case: French.