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Press et Information

Advocate General's Opinion in Case C-202/13
Sean Ambrose McCarthy and Others v Secretary of State for the Home Department

According to Advocate General Szpunar, a Member State may not make a third-country national's right of entry subject to the prior obtaining of a visa, when he already holds a 'Residence card of a family member of a Union citizen' issued by another Member State

Authorising a Member State to put such a precautionary measure of general application into effect would be tantamount to permitting it to circumvent the right to freedom of movement and would be contrary to the principle of mutual recognition

An EU directive[1] provides that possession of a valid residence card exempts third-country nationals who are members of the family of an EU citizen, from having to obtain an entry visa. Nevertheless, Member States may adopt the necessary measures to refuse, terminate or withdraw any right conferred by this directive in the case of abuse of rights or fraud, such as marriages of convenience. Any such measure must be proportionate and subject to the procedural safeguards provided.

Mr Sean Ambrose McCarthy has dual British and Irish nationality. He is married to a Colombian national with whom he has a daughter. Since 2010 the family has lived in Spain, where they own a house. Mr and Ms McCarthy also own a house in the United Kingdom, to which they regularly travel. Ms Helena Patricia McCarthy is the holder of an EU family member's residence card ('residence card') issued by the Spanish authorities. Under the UK provisions on immigration, in order to be able to travel to the United Kingdom, holders of those cards must apply for an entry permit ('the EEA family permit'), valid for six months. This family permit may be renewed, provided that the holder personally attends a United Kingdom diplomatic mission abroad and fills in a form containing details of the applicant's finances and employment.

In 2012, taking the view that those provisions of national law prejudice their rights to freedom of movement, the McCarthy family brought proceedings before the High Court of Justice (England & Wales), Queen's Bench Division (Administrative Court) (United Kingdom). That court has asked the Court of Justice whether, in the light of the Directive and of Protocol No 20 (the Frontiers Protocol),[2] third-country nationals may, generally, be obliged to obtain a visa in order to be allowed to enter the territory of the United Kingdom when they already have a residence card.

In today's Opinion, Advocate General Maciej Szpunar first examines whether the directive is applicable to the McCarthy family's situation. Here he proposes a broad interpretation of the directive. In his view, the directive must apply to the case in which an EU citizen, after exercising his right of freedom of movement and genuinely residing in another Member State, decides to travel, with the members of his family possessing the nationality of a third country, to the Member State of he is a national. Such an interpretation would seem justified not only in the light of the role

[1] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77, 'the Directive').
[2] Protocol on the application of certain aspects of Article 26 of the Treaty on the Functioning of the European Union to the United Kingdom and to Ireland.

played by citizenship as EU law currently stands, but also in the light of the relevant case-law of the Court.[3]

If the Court were not to follow his first proposal, the Advocate General proposes that Directive 2004/38 should apply, at the very least, to EU citizens and to third-country national family members genuinely exercising their freedom of movement by residing in another Member State while simultaneously making short trips to the Member State of which the citizens concerned are nationals. This second proposal relates exclusively to the right of entry and of short-term residence.

Next, the Advocate General considers whether, and if so on what conditions, the directive allows a Member State, in order to cope with a 'systemic abuse of rights' when residence cards are issued, to require the prior issue of an entry visa, when that general, precautionary obligation does not depend on the previous finding of an abuse of rights in a specific case.

Mr Szpunar observes here that a measure of general application, such as that laid down by the UK, would deprive the procedural guarantees provided for by the directive of their substance. To his mind, the systematic suspension of those rights does not allow either the national court or this Court to ascertain whether the conditions that led the UK authorities to disregard that right for the McCarthy family have in fact been met.

The Advocate General considers that the evidence adduced by the United Kingdom cannot be regarded as specific evidence linked to the individual conduct of the McCarthy family. In this connection, he notes that that family's conduct does not constitute an abuse of rights within the meaning of EU law. He observes too that a general presumption of fraud is not sufficient to justify a measure that compromises the objectives of the TFEU. The assessment of abusive conduct is in principle a matter for the national courts, but their assessment must not in any circumstances jeopardise the uniformity and effectiveness of EU law.

As regards the British family permit, the Advocate General considers that it amounts quite simply to an obligation to have a visa, which is contrary not only to the directive but also to the objectives and the very system of that directive. In consequence, provided that the third-country national family member of the EU citizen satisfies the conditions that allow him to benefit from the right of freedom of movement, the corresponding residence card must be accepted by the Member States.

According to Mr Szpunar, authorising a Member State to disregard the residence card issued by another Member State would be contrary to the principle of mutual recognition. The administrative and judicial authorities of a Member State are bound to accept certificates and analogous documents relative to personal status issued by the competent authorities of the other Member States, unless their accuracy is seriously shaken by concrete evidence relating to the individual case in question. Moreover, to accept the implementation of measures of general application laid down by the United Kingdom would be tantamount to allowing that Member State to circumvent the right of freedom of movement, with the result that other Member States could also adopt such measures and unilaterally suspend the application of the directive.

Mr Szpunar concludes therefrom that the directive does not entitle a Member State to adopt a measure of general application such as that at issue in this case (that is to say, a measure refusing family members of an EU citizen who hold valid residence cards issued by another Member State exemption from the obligation to obtain a visa), when that measure is precautionary and is not based on a prior finding of an abuse of rights in a specific case.

Lastly, as regards the Frontiers Protocol, the Advocate General notes that it is not intended to confer special privileges on the United Kingdom, but was adopted in order to take account of that Member State's desire to maintain border controls with most Member States and also the existing 'Common Travel Area' between the UK and Ireland. Border controls are intended, in particular, to determine whether the persons concerned have the right to enter the United Kingdom. However,

[3] In particular, Cases C-291/05 *Eind* and Case C-456/12, *O*, see Press Release CP n° 32/14).

that determination does not entitle the UK to refuse unilaterally to allow EU citizens and members of their families with a residence card to enter its territory, by requiring generally that they obtain and present at its borders an additional document for which EU law makes no provision.

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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