



Press and Information

Court of Justice of the European Union

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Judgment in Case C-202/13

Sean Ambrose McCarthy and Others v Secretary of State for the Home
Department

Where third-country nationals hold a ‘residence card of a family member of a Union citizen’, the United Kingdom cannot make their right of entry subject to the requirement that they must first obtain a visa

The directive on free movement of Union citizens does not allow measures which, in pursuit of an objective of general prevention, preclude family members from entering the territory of a Member State without a visa

Sean Ambrose McCarthy has dual British and Irish nationality. He is married to a Colombian national, Helena Patricia McCarthy Rodriguez, with whom he has a daughter. The family has been resident since 2010 in Spain where they have a house. Mr McCarthy and Ms McCarthy Rodriguez also own a house in the United Kingdom and travel regularly to that country. Ms McCarthy Rodriguez holds a ‘residence card of a family member of a Union citizen’ (‘residence card’) issued by the Spanish authorities. Under the UK provisions concerning immigration, in order to be able to travel to the UK holders of such a card must apply for an entry permit (‘EEA family permit’), which is valid for six months. This family permit can be renewed provided that its holder goes in person to a British diplomatic mission abroad and fills in a form setting out details relating to his or her finances and employment.

Taking the view that those national provisions infringed their rights of free movement, in 2012 the McCarthy family brought an action before the High Court of Justice of England and Wales, Queen’s Bench Division (Administrative Court). That court asked the Court of Justice whether, in the light of Directive 2004/38¹ and Protocol No 20, third-country nationals may be required, generally, to obtain a visa in order to be able to enter UK territory when they already hold a residence card.

The Court of Justice confirms that Directive 2004/38 is applicable to the situation of the McCarthy family. The directive applies to any EU 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 and to his family members. There is nothing in Directive 2004/38 indicating that the right of entry of family members of the EU citizen who are not nationals of a Member State and the exemption, laid down in the first subparagraph of Article 5(2) of the directive, from the requirement to have a visa are limited to Member States other than the Member State of origin of the EU citizen. Thus, where a family member of an EU citizen who has exercised his right of freedom of movement is in a situation such as that of Ms McCarthy Rodriguez, that family member is not subject to the requirement to obtain a visa or an equivalent requirement in order to be able to enter the territory of that EU citizen’s Member State of origin.

The Court then examines whether, and in what circumstances, Directive 2004/38 permits a Member State to require prior issue of an entry permit in order to deal with a general risk of systemic abuse of rights or fraud.

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 Court holds that the Member States can adopt measures on the basis of Article 35 of Directive 2004/38 to refuse, terminate or withdraw a right conferred by that directive if there is an abuse of rights or fraud only after conducting an individual examination of each case. Thus, the national authorities are required to recognise, for the purposes of entry into their territory without a visa, a residence card issued pursuant to the directive by another Member State, unless doubt is cast on the authenticity of that card and the correctness of the data appearing on it by concrete evidence which, in relation to the individual case, justifies the conclusion that there is an abuse of rights or fraud.

The legislation at issue requires an entry permit to be obtained prior to entry into UK territory, even where the authorities do not consider that the family member of an EU citizen may be involved in an abuse of rights or fraud. Family members who possess a valid residence card are thus prevented absolutely and automatically by the legislation from entering the territory of the Member States without a visa, although that right of entry is conferred on them by the directive.

The fact that a Member State is faced with a high number of cases of abuse of rights or fraud committed by third-country nationals cannot, in the absence of an express provision in Directive 2004/38, justify the adoption of a measure founded on considerations of general prevention, to the exclusion of any specific assessment of the conduct of the person concerned himself. Such measures would mean, as in the present case, that the mere fact of belonging to a particular group of persons would allow the Member States to refuse to recognise a right expressly conferred by Directive 2004/38 on family members of an EU citizen who are not nationals of a Member State, although those family members in fact fulfil the conditions laid down by that directive, and, being automatic in nature, they would disregard the very substance of the primary and individual right of EU citizens to move and reside freely within the territory of the Member States.

Finally, as regards Protocol No 20, the Court holds that the border checks which the UK is entitled to carry out by virtue of the protocol may include examination of the authenticity of documents and of the correctness of data as well as examination of concrete evidence that justifies the conclusion that there is an abuse of rights or fraud. On the other hand, it is not permitted to determine the conditions for entry of persons who have a right of entry under EU law or to impose upon them extra conditions for entry or conditions other than those provided for by EU law.

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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The [full text](#) of the judgment is published on the CURIA website on the day of delivery.

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