

Case C-754/18**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

3 December 2018

Referring court:Fővárosi Közigazgatási és Munkaügyi Bíróság (Budapest
Administrative and Labour Court, Hungary)**Date of the decision to refer:**

21 November 2018

Applicant:

Ryanair Designated Activity Company

Defendant:Országos Rendőr-főkapitányság (Hungarian Directorate General of
Police)**Subject matter of the main proceedings**

Legal action challenging a fine imposed on an air carrier in a procedure relating to public order.

Subject matter and legal basis of the request for a preliminary ruling

Definition and scope of the permanent residence card referred to in Article 20 of Directive 2004/38; scope of the visa waiver derived from the Schengen *acquis* in relation to a permanent residence card issued by the United Kingdom to a third-country family member under Article 20 of Directive 2004/38.

Scope of the obligation to check travel documents incumbent on air carriers under Article 26 of the Convention implementing the Schengen Agreement.

Legal basis: Article 267 TFEU.

Questions referred for a preliminary ruling

- (1) Must Article 5(2), on right of entry, 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 be interpreted as meaning that, for the purposes of that directive, both the holding of a valid residence card, as referred to in Article 10 thereof, and the holding of a permanent residence card, as referred to in Article 20 thereof, exempt a family member from the requirement to be in possession of a visa at the time of entry to the territory of a Member State?
- (2) If the answer to question 1 is in the affirmative, must Article 5 of Directive 2004/38, and paragraph 2 thereof, be interpreted in the same way where the person who is a family member of an EU citizen and is not a national of another Member State has acquired the right of permanent residence in the United Kingdom and that is the State which issued the permanent residence card to that person? In other words, does the holding of the permanent residence card provided for in Article 20 of that directive, issued by the United Kingdom, exempt the holder of that card from the requirement to obtain a visa, regardless of the fact that neither Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, to which Article 5(2) of Directive 2004/38 refers, nor Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) is applicable to that Member State?
- (3) If the answers to questions 1 and 2 are in the affirmative, is the holding of a residence card issued in accordance with Article 20 of Directive 2004/38 to be regarded by itself as sufficient proof that the holder of the card is a family member of an EU citizen and is, without the need for any further checking or certification, permitted — as a family member — to enter the territory of another Member State and is exempt from the requirement to obtain a visa pursuant to Article 5(2) of that directive?
- (4) If the Court of Justice should answer question 3 in the negative, must Article 26(1)(b) and (2) of the Convention implementing the Schengen Agreement be interpreted as meaning that an air carrier, in addition to checking travel documents, is required to check that a traveller who intends to travel with the permanent residence card referred to in Article 20 of Directive 2004/38 is in fact genuinely a family member of an EU citizen at the time of entry?

- (5) If the Court of Justice should answer question 4 in the affirmative,
- (1) where an air carrier is unable to establish that a traveller who intends to travel with the permanent residence card referred to in Article 20 of Directive 2004/38 is actually a family member of an EU citizen at the time of entry, is that carrier required to deny boarding onto the aircraft and to refuse to transport that person to another Member State?
 - (2) where an air carrier does not check that circumstance or does not refuse to transport a traveller who is unable to provide evidence that he is a family member — and who, moreover, holds a permanent residence card — is it possible to impose a fine on that carrier on that ground pursuant to Article 26(2) of the Convention implementing the Schengen Agreement?

Provisions of EU law relied on

Article 21(1) TFEU.

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), recitals 5, 7 and 8, and Articles 5, 10, 16, 18 and 20.

Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (OJ 2000 L 239, p. 19; ‘CISA’), Article 26.

Council Directive 2001/51/EC of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985 (OJ 2001 L 187, p.45), Article 4.

Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (OJ 2001 L 81, p. 1), recital 4.

Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ 2016 L 77, p. 1), recital 42.

Judgment of the Court of Justice of 14 November 2017, *Lounes* (C-165/16, EU:C:2016:862), paragraphs 32 and 48.

Provisions of national law relied on

A szabad mozgás és tartózkodás jogával rendelkező személyek beutazásáról és tartózkodásáról szóló 2007. évi I. törvény (Law I of 2007 on the right of entry and residence of persons having the right of free movement and residence), Paragraph 3(2) to (4).

A harmadik országbeli állampolgárok beutazásáról és tartózkodásáról szóló 2007. évi II. törvény (Law II of 2007 on the entry and residence of third-country nationals), Paragraph 69(1) and (5).

Brief summary of the facts and the procedure in the main proceedings

- 1 On 9 October 2017, the airport police carried out checks at the Ferenc Liszt airport in Budapest, on passengers arriving on the London-Budapest flight operated by Ryanair (the applicant) and refused to grant entry to Hungarian territory to a Ukrainian citizen who was in possession of a permanent residence card issued by the United Kingdom under Article 20 of Directive 2004/38, which was referred to in his passport using the term '*Permanent Residence Card*', but who did not have a visa. The Ukrainian citizen was travelling alone and did not present any document attesting to his family situation.
- 2 The Hungarian Directorate General of Police imposed on Ryanair a public order related fine in the amount of EUR 3000 for infringement of Article 26 of the CISA, on the ground that, as an air carrier, it had failed to take the necessary measures to ensure that the foreign national it was transporting was in possession of the travel documents required for entry to Hungarian territory.

Essential arguments of the parties in the main proceedings

- 3 The applicant submits that the Ukrainian citizen had the right to move freely within the territory of the European Union and that since he was in possession of a permanent residence permit issued by the United Kingdom in accordance with Article 20 of Directive 2004/38, he was entitled to enter Hungary. The applicant maintains that the permanent residence card proves by itself that the Ukrainian citizen is a family member of an EU citizen and that, consequently, he could enter the territory of any other Member State without a visa pursuant to Article 5(2) of that directive. The applicant argues that only persons who already hold a 'residence card of a family member of a Union citizen' have the right to obtain a permanent residence card. The applicant submits that this is the situation which occurred in the present case, for the Ukrainian citizen's passport made clear that a prior residence card existed. For that reason, even in the absence of an actual statement to that effect, the permanent residence card unequivocally proves that the Ukrainian citizen is a family member. The applicant further submits that if that card does not itself prove that he has the status of family member, the applicant, as an air carrier, had neither the right nor the obligation to carry out an additional

check of the family relationship, and maintains that it cannot be penalised for not having conducted such a check.

- 4 The defendant argues that the applicant should have known that the permanent residence card does not guarantee that the Ukrainian citizen does not need a visa and that it should have refused to transport him if he was not in possession of a travel document allowing him to enter the country. In the defendant's submission, a literal interpretation is required of Article 5(2) of Directive 2004/38, pursuant to which only persons in possession of a residence card complying with Article 10 of that directive are exempt from the visa requirement and only that card is capable of attesting by itself to the status of family member. The defendant submits that the reason for that distinction lies in the fact that the residence card referred to in Article 10 of Directive 2004/38 is specifically called 'residence card of a family member of a Union citizen', so that it is possible to establish unequivocally from the document itself that the holder is a family member of an EU citizen. By contrast, a permanent residence card does not refer to the status of family member and, accordingly, does not prove that its holder is actually a family member of an EU citizen. The defendant also submits that since the United Kingdom is not part of the Schengen area, the permanent residence cards it issues do not exempt holders from the visa requirement.

Succinct presentation of the reasoning in the request for a preliminary ruling

- 5 Question 1 asks whether Article 5(2) of Directive 2004/38 must be given a strict literal interpretation and be construed as meaning that it refers solely to the residence card referred to in Article 10 or whether that provision must be interpreted more broadly and it accepted that it also refers to the permanent residence card referred to in Article 20. In relation to this question, the referring court states that third-country nationals who have lawfully resided as a family member of an EU citizen for a continuous period of five years in the host Member State have the right to obtain a permanent residence card. It is apparent from a logical connection between Articles 10, 16(2) and 20 of Directive 2004/38 that the permanent residence card is issued to a family member of an EU citizen after that family member has previously held a residence card. Thus, the spirit of that directive implies that the right of permanent residence must be regarded as an enhancement of the right of residence and an extension of the rights conferred by that [earlier] right of residence.
- 6 Although Directive 2004/38 governs the right of exit and entry, on the one hand, and the right of residence, on the other, in different chapters, it is apparent from the logical structure of the chapters governing the right of residence that the right of entry governed by Article 5 must be granted not only to persons having a right of residence but also to persons having a permanent right of residence and, where those persons have been granted that right, they must also be granted the benefit provided for in Article 5(2), namely exemption from the requirement to have a visa.

- 7 Question 2. If the Court of Justice answers question 1 in the affirmative, it will be necessary, in order to adjudicate on the dispute, to answer the question of whether Article 5 of Directive 2004/38 — in conjunction with the Schengen Agreement and the provisions of EU law relating to the implementation of that agreement — can be interpreted as meaning that a permanent residence card issued by a Member State which is not part of the Schengen area (the United Kingdom) permits entry without a visa to the territory of another Member State.
- 8 Question 3. If the Court of Justice answers questions 1 and 2 in the affirmative, the question arises of whether the permanent residence card by itself attests to the existence of a family relationship and the existence of the associated right of entry or whether it merely allows entry without a visa when it is accompanied by another certificate or other evidence (for example a civil status certificate or other document). According to the judgment of the Court of 14 November 2017, *Lounes* (C-165/16, EU:C:2017:862), paragraphs 32 and 48, a family member who is a third-country national does not have an autonomous right of entry and instead only enjoys that benefit as a right associated with the exercise of freedom of movement by the family member who has EU citizenship.
- 9 The right of entry differs from the right of residence and Directive 2004/38 governs the right in a specific chapter. That directive contains no provision pursuant to which all third-country nationals granted the right of residence under Directive 2004/38 also have the right of entry to the territory of another Member State.
- 10 In addition, a third-country national who does not have a family relationship with an EU citizen — for example, as a result of death or dissolution of marriage — may also hold a permanent residence card (Articles 12 and 13 of Directive 2004/38). Are those third-country nationals also granted the right of entry to the territory of another Member State and exemption from the visa requirement despite the fact that, in such cases, the exercise of those rights is not consistent with the practical effect of Article 21 TFEU?
- 11 The answer given to those questions is relevant to the outcome of the proceedings because, if the permanent residence card by itself attests to the existence of the right of entry, the air carrier is not subject in any event to the requirement to carry out an additional check and, if it did confirm the validity of the travel document and the permanent residence card, it cannot be found to have committed an infringement, in which case it would not be necessary to answer questions 4 and 5.
- 12 Question 4 is referred for a preliminary ruling in case the Court of Justice finds that it is necessary to draw a distinction, as regards the right of entry, between third-country nationals who actually have an existing family relationship and third-country nationals whose family relationship has been dissolved but who still have a right of residence under Directive 2004/38. In the main proceedings, this gives rise to the practical difficulty of determining whether the air carrier has the

duty and the power to check that the third-country national's family relationship continues to exist at the time of travel.

- 13 In accordance with the wording of Article 26 of the CISA, the carrier is obliged to check the travel documents required for entry [to a State]. In the context of the main proceedings, it is necessary to ascertain whether the term 'travel documents' in Article 26 must be interpreted strictly, so that the carrier's obligation is confined to checking the passport and the permanent residence card contained therein, or whether it must be interpreted broadly in such a way that it also encompasses a check of every document serving to permit the journey or other certificates (for example, a civil status certificate).
- 14 When answering that question, it must be borne in mind that an air carrier is not an authority and does not have official control instruments. Furthermore, nor do air carriers have a proper right of access to, and management of, the personal data relating to travellers' family relationships and private lives.
- 15 Question 5. If the obligation incumbent on the carrier to carry out checks involves the checking of additional documents and circumstances in addition to checking the travel documents, it will also be necessary to answer two further questions. First, it will be necessary to determine whether the fact that the traveller is unable to provide sufficient evidence of his family relationship but is at the same time permitted to enter in accordance with the travel document is a sufficient reason for the air carrier to refuse to transport the traveller. Secondly, it will be necessary to determine what the consequence is of the failure of the carrier to carry out such a check.
- 16 In order to assess whether the fine imposed is lawful, the Court of Justice must also determine whether the carrier may be penalised pursuant to Article 26(2) of the CISA for failure to check other documents which attest to the right of entry when it did check that the travel documents and the permanent residence card existed.