

Case C-930/19**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:**

20 December 2019

Referring court:

Conseil du contentieux des étrangers (Belgium)

Date of the decision to refer:

13 December 2019

Applicant:

X

Defendant:

Belgian State

1. Subject matter and circumstances of the dispute

- 1 X, an Algerian national, married S.K., a French national, in Algiers (Algeria) on 26 September 2010. X arrived on Belgian territory on 22 February 2012 to rejoin his wife, who had permission to reside in Belgium. X was issued a residence permit as a family member of an EU citizen.
- 2 X and S.K. have a child.
- 3 After almost five years of marriage and two years of living together in Belgium, X, who had been subjected to attacks by his wife (verbal abuse, physical aggression and death threats), was forced to leave the family home. X moved to a different address from his wife and daughter on 22 May 2015. He has continued to live separately since that time. S.K. has been living in France with their daughter since 10 September 2015.
- 4 On 14 December 2017, the defendant terminated X's right of residence. It observes that X undoubtedly found himself in 'particularly difficult circumstances' (a violent marriage), but adds that he has not established that he

has appropriate means of subsistence at his disposal so as not to remain dependent on social security, as Belgian legislation requires.

- 5 On 26 January 2018, X brought an action for annulment of that decision before the Conseil du contentieux des étrangers (Council for asylum and immigration proceedings, Belgium).

2. Relevant provisions of EU law

Charter of fundamental rights of the European Union

- 6 Article 20 provides:

‘Equality before the law

Everyone is equal before the law.’

- 7 Article 21 provides:

‘Non-discrimination

1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

2. Within the scope of application of the Treaties and without prejudice to any of their special provisions, any discrimination on grounds of nationality shall be prohibited.’

Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification

- 8 Article 15 provides:

‘1. Not later than after five years of residence, and provided that the family member has not been granted a residence permit for reasons other than family reunification, the spouse or unmarried partner and a child who has reached majority shall be entitled, upon application, if required, to an autonomous residence permit, independent of that of the sponsor.

Member States may limit the granting of the residence permit referred to in the first subparagraph to the spouse or unmarried partner in cases of breakdown of the family relationship.

2. The Member States may issue an autonomous residence permit to adult children and to relatives in the direct ascending line to whom Article 4(2) applies.

3. In the event of widowhood, divorce, separation, or death of first-degree relatives in the direct ascending or descending line, an autonomous residence permit may be issued, upon application, if required, to persons who have entered by virtue of family reunification. Member States shall lay down provisions ensuring the granting of an autonomous residence permit in the event of particularly difficult circumstances.

4. The conditions relating to the granting and duration of the autonomous residence permit are established by national law.'

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

9 Article 13 provides:

'Retention of the right of residence by family members in the event of divorce, annulment of marriage or termination of registered partnership

1. ...

2. Without prejudice to the second subparagraph, divorce, annulment of marriage or termination of the registered partnership referred to in point 2(b) of Article 2 shall not entail loss of the right of residence of a Union citizen's family members who are not nationals of a Member State where:

...

(c) this is warranted by particularly difficult circumstances, such as having been a victim of domestic violence while the marriage or registered partnership was subsisting; or

...

Before acquiring the right of permanent residence, the right of residence of the persons concerned shall remain subject to the requirement that they are able to show that they are workers or self-employed persons or 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 and have comprehensive sickness insurance cover in the host Member State, or that they are members of the family, already constituted in the host Member State, of a person satisfying these requirements.'

3. The parties' positions

3.1. X

- 10 X objects to the unjustified unequal treatment which he has received as the spouse of an EU national, by comparison with the spouse of a third country national holding an indefinite right of residence, particularly in circumstances where the communal life of the family comes to an end following domestic violence.
- 11 His right to continued residence is effectively conditional on working or possessing sufficient resources, which would not be the case for the spouse of such a third country national.
- 12 X maintains that such discrimination is contrary, inter alia, to Articles 20 and 21 of the Charter.

3.2. *The defendant*

- 13 In the present case, the applicant has not demonstrated how his situation (as a family member of an EU citizen) is comparable to that of a family member of a citizen who is a national of a third country and has an indefinite right of residence.
- 14 The situation of EU citizens cannot be compared with that of third country nationals. The same applies to the situation of (former) members of their families.
- 15 Even supposing the categories under comparison to be similar, which they are not, the difference in treatment relied on by the applicant is based on an objective criterion and cannot be regarded as disproportionate.
- 16 Indeed, the legal provision at issue, imposing the requirement for resources, transposes Directive 2004/38, and in particular Article 13 of that directive, into national law.
- 17 Furthermore, as regards the principle of non-discrimination contained in Article 21 of the Charter, paragraph 2 of that article corresponds to the first paragraph of Article 18 TFEU (formerly Article 12 EC) (see the Explanations relating to the Charter of Fundamental Rights (OJ 2007 C 303, p. 2)). The Court of Justice has held that 'that provision ... is not intended to apply to cases of a possible difference in treatment between nationals of Member States and nationals of non-member countries' (judgment of 4 June 2009, *Vatsouras and Koupatantze*, C-22/08 and C-23/08, EU:C:2009:344, paragraph 52). It follows that Article 21(2) of the Charter only concerns situations in which a national of one Member State suffers discriminatory treatment in relation to nationals of another Member State solely on the basis of his nationality, which is not the position in the present case. Accordingly, there can be no finding of discrimination under Article 21 of the Charter in the present case.

4. Assessment of the Conseil du contentieux des étrangers (Council for asylum and immigration proceedings)

- 18 The Council for asylum and immigration proceedings observes that family members who are victims of domestic violence are indeed treated differently depending on whether family reunion has taken place with an EU citizen or with a third country national permitted to reside in Belgium.
- 19 In both cases there is a right to continue in residence in the event that the communal life of the family comes to an end due to acts of violence, but unlike family members of an EU citizen, family members of a third country national are not required to produce evidence of anything beyond the fact that acts of violence have taken place.
- 20 The Cour Constitutionnelle (Constitutional Court, Belgium) has held that the same difference in the treatment of family members of a Belgian national, as compared with family members of a third country national, is not justified, though it emphasised that the provisions at issue 'are applicable to family members of a Belgian national who has not exercised his right of free movement. In such a case, the fact that family members of a Belgian national are subject to the [legal] requirements is not a result of the transposition of Directive 2004/38/EC, but is based on an autonomous decision of the Belgian legislature.' (judgment No 17/2019 of 7 February 2019).
- 21 In the present case, the defendant has applied a legal provision which transposes a provision of a directive (Article 13(2) of Directive 2004/38/EC). This system differs from that envisaged by another directive, concerning family members of nationals of third countries (Article 15 of Directive 2003/86/EC).
- 22 It is well established in the case-law of the Court that national courts do not have the power to declare EU acts invalid (judgment of 22 October 1987, *Foto-Frost*, 314/85, EU:C:1987:452, paragraph 15). Accordingly, the Council considers it necessary to refer the matter to the Court of Justice, for it to rule on the question of discrimination arising from the difference in treatment for which the EU legislature has provided, as between two categories of family members, in two different EU legislative instruments.
- 23 It must always be possible for an EU legislative act to be examined in the light of the principle of equal treatment or that of non-discrimination, as enshrined in Articles 20 and 21 of the Charter. If such an act cannot be interpreted in such a way as to conform to those principles, it must be declared invalid and the national provisions implementing it must be set aside.
- 24 Finally, the Council does not consider it necessary to address the argument advanced by the defendant in relation to the applicability of Article 21 of the Charter (see paragraph 17 above), as the Court will rule on the applicability of Article 20 or Article 21(1) or (2) of the Charter to the facts of present case.

- 25 In the light of the foregoing, the Council considers it necessary to seek a preliminary ruling from the Court as to whether it is compatible with Articles 20 and 21 of the Charter to lay down a general, supplementary condition in Article 13(2) of Directive 2004/38/EC, and thus as to whether that provision of EU law is valid.

5. Question referred for a preliminary ruling

- 26 The Conseil du contentieux des étrangers (Council for asylum and immigration proceedings) refers the following question to the Court of Justice pursuant to Article 267 TFEU:

‘Does Article 13(2) 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 infringe Articles 20 and 21 of the Charter of Fundamental Rights of the European Union, in that it provides that divorce, annulment of marriage or termination of a registered partnership does not entail loss of the right of residence of a Union citizen’s family members who are not nationals of a Member State where, inter alia, this is warranted by particularly difficult circumstances, such as having been a victim of domestic violence while the marriage or registered partnership was subsisting, but only on the condition that the persons concerned show that they are workers or self-employed persons or 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 and have comprehensive sickness insurance cover in the host Member State, or that they are members of the family, already constituted in the host Member State, of a person satisfying these requirements, whereas Article 15(3) of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, which makes the same provision for the right of residence to continue, does not make its continuation subject to that condition?’