



Press and Information

Court of Justice of the European Union

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Judgment in Cases C-456/12 and C-457/12
O., B., S. and G. v Minister voor Immigratie, Integratie en Asiel

The Court clarifies the rules on the right of residence of third-country nationals who are family members of an EU citizen in the Member State of origin of that citizen

Directive 2004/38/EC grants EU citizens and their family members the right to move and reside freely within the territory of the Member States¹. In that regard, the Raad van State (Netherlands, Council of State) has made two separate requests to the Court of Justice for a preliminary ruling in the context of four cases concerning the refusal of Netherlands' authorities to grant a right of residence to a third-country national who is a family member of an EU citizen of Netherlands nationality.

Case C-456/12: Mr O. and Mr B.'s situation

Case C-456/12 concerns the refusal to grant a right of residence where the EU citizen returns to the Member State of which he is a national after short periods of residence in another Member State with the family member in question.

In 2006, Mr O., a Nigerian national, married a Netherlands national and from 2007 to April 2010 he lived in Spain. During that period, Mr O.'s wife resided for two months with her husband in Spain and regularly spent time with Mr O. in the form of holidays in Spain.

Mr B., a Moroccan national, lived from December 2002 with his partner who has Netherlands nationality. In 2005, Mr B. moved to Belgium and lived in an apartment rented by his partner. His partner resided with Mr B. in Belgium every weekend. In April 2007, Mr B. returned to Morocco and in July 2007 Mr B. married the Netherlands national in question.

As Mr O. and Mr B. were family members of EU citizens, the referring court asks whether EU law, in particular Article 21 TFEU and Directive 2004/38, grants such third-country nationals a right of residence in the Member State of which the citizens in question are nationals.

The Court points out first of all that Article 21 TFEU and Directive 2004/38 do not confer any autonomous right on third-country nationals. Any rights conferred on third-country nationals are rights derived from the exercise of freedom of movement by an EU citizen.

The Court finds next that Directive 2004/38 does not confer any derived right of residence on third-country nationals who are family members of an EU citizen residing in the Member State of which he is a national. Directive 2004/38 applies only where a citizen moves or resides in a Member State other than that of which he is a national.

With regard to the question as to whether Article 21 TFEU grants such a derived right of residence, the Court explains that a refusal to allow a derived right of residence for a family member of an EU citizen who is a third-country national, may interfere with the EU citizen's freedom of movement under that provision. An EU citizen may be discouraged from leaving his Member State of origin because he is uncertain whether he will be able to continue, on returning to that Member State, a

¹ Directive of the European Parliament and of the Council of 29 April 2004 (OJ 2004 L 158, p. 77) and corrigenda (OJ 2004 L 229, p. 35, and OJ 2005 L 197, p. 34).

family life which he will have created or strengthened in another Member State. However, such an obstacle will arise only where the residence in the host Member State has been genuine, that is to say where it satisfies the requirements of Directive 2004/38 relating to a right of residence for a period of longer than three months.

It follows that, where an EU citizen has, pursuant to and in conformity with the provisions of Directive 2004/38 relating to a right of residence for a period of longer than three months, genuinely resided in another Member State and, during that genuine residence, a family life has been created and strengthened in that Member State, the effectiveness of Article 21 TFEU requires that the citizen's family life in the host Member State may continue on returning to his Member State of origin. That implies that, in such a case, a derived right of residence is allowed for the family member who is a third-country national.

The conditions for granting such a derived right of residence, based on Article 21 TFEU should not, in principle, be more strict than those provided for by Directive 2004/38 for the grant of a derived right of residence to a third-country national who is a family member of an EU citizen where that citizen 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. Even though Directive 2004/38 does not cover the return of the EU citizen to the Member State of which he is a national, it should be applied by analogy given that in both cases it is the EU citizen who is the reference point for the grant of a derived right of residence to a third-country national who is a member of his family.

As regards the question whether the cumulative effect of various short periods of residence in the host Member State may create a derived right of residence for a family member of an EU citizen who is a third-country national on the citizen's return to his Member State of origin, the Court points out that only a period of residence satisfying the conditions of Directive 2004/38 relating to a right of residence for a period of longer than three months will give rise to such a right of residence. The Court notes that, even when considered together, short periods of residence (such as weekends or holidays spent in a Member State other than that of which the citizen is a national) do not satisfy those conditions.

The court notes in addition that Mr B. acquired the status of family member of an EU citizen after his partner's residence in the host Member State. A third-country national, who has not had, at least during part of his residence in the host Member State, the status of family member of an EU citizen, is not entitled to a derived right of residence in that Member State pursuant to Directive 2004/38. Accordingly, that third-country national is also unable to rely on Article 21 TFEU for the grant of a derived right of residence on the return of the EU citizen to the Member State of which he is a national.

In the light of all the foregoing, the Court rules that where an EU citizen has, pursuant to and in conformity with the provisions of Directive 2004/38 relating to a right of residence for a period of longer than three months, created or strengthened a family life with a third-country national during genuine residence in a Member State other than that of which he is a national, the provisions of that directive apply by analogy where that EU citizen returns, with the family member in question, to his Member State of origin.

Case C-457/12: Ms S. and Ms G.'s situation

Like Case C-456/12, Case C-457/12 concerns the refusal of Netherlands' authorities to grant a right of residence to a family member of an EU citizen of Netherlands nationality. However, unlike Case C-456/12, the Union citizens in question have not resided with a family member in a Member State other than that of which they are nationals.

Ms S. is a Ukrainian national. She claims a right of residence with her son-in-law who is a Netherlands national. Ms S. submits that she takes care of her grandson. Her son-in-law resides in the Netherlands but travels to Belgium at least once a week in the course of his work for an employer established in the Netherlands.

Ms G., a Peruvian national, married a Netherlands national in 2009. The latter resides in the Netherlands but works for an undertaking established in Belgium. He travels daily between the Netherlands and Belgium for his work.

In that context, the Raad van State asks, in essence, whether EU law confers a derived right of residence on a third-country national who is a family member of an EU citizen where that citizen resides in the Member State of which he is a national but regularly travels to another Member State in the course of his professional activities.

The Court confirms that, in the situations at issue in Case C-457/12, the EU citizens fall within the scope of freedom of movement for workers guaranteed by Article 45 TFEU. Any EU citizen who, under an employment contract, works in a Member State other than that of their place of residence falls within the scope of Article 45 TFEU.

The Court points out next that the effectiveness of the right to freedom of movement for workers may require that a derived right of residence be granted under Article 45 TFEU to a third-country national who is a family member of the worker – an EU citizen – in the Member State of which the latter is a national.

It is therefore for the referring court to determine whether, in each of the situations at issue in Case C-457/12, the grant of a derived right of residence to the third-country national in question who is a family member of an EU citizen is necessary to guarantee the citizen's effective exercise of the rights guaranteed by Article 45 TFEU. According to the Court, the fact that the third-country national in question takes care of the EU citizens' child may be a relevant factor to be taken into account when examining whether the refusal to grant a right of residence to that third-country national may discourage the EU citizen from effectively exercising his rights under Article 45 TFEU. However, the mere fact that it might appear desirable that the child be cared for by the third-country national who is the direct relative in the ascending line of the EU citizen's spouse is not sufficient in itself to constitute such a dissuasive effect.

Article 45 TFEU therefore confers a derived right of residence on a third-country national who is the family member of an EU citizen in the Member State of which that citizen is a national, where the citizen resides in that Member State but regularly travels to another Member State as a worker within the meaning of that provision, if the refusal to grant such a right of residence discourages the worker from effectively exercising his rights under Article 45 TFEU, which it is for the referring court to determine.

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 texts of the judgments ([C-456/12](#) & [C-457/12](#)) are published on the CURIA website on the day of delivery.

Press contact: Christopher Fretwell ☎ (+352) 4303 3355