

**Case C-607/21****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:**

30 September 2021

**Referring court:**

Conseil d'État (Belgium)

**Date of the decision to refer:**

14 September 2021

**Appellant:**

XXX

**Respondent:**

État belge

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**1. Subject matter and facts of the dispute:**

- 1 On 25 July 2011, the appellant, a Moroccan national, entered Belgian territory.
- 2 On 21 September 2011, she lodged an application for residence as a relative in the ascending line of a Belgian national (her son).
- 3 On 21 October 2011, her application was rejected on the ground that the law no longer grants family reunification to relatives in the ascending line of Belgian nationals.
- 4 On 26 June 2015, the appellant lodged a new application for residence as a family member of a Union citizen, namely of Ms N. E.K., a Netherlands national, who has made a declaration of cohabitation with the appellant's son, which was received by the Registrar of Anderlecht (Belgium) on 11 February 2005.
- 5 On 28 September 2015, her application was rejected.
- 6 On 14 April 2016, the Conseil du contentieux des étrangers (Council for asylum and immigration proceedings) dismissed her action.

- 7 On 9 November 2017, the appellant lodged a new application for residence under Article 40a of the loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers (Law of 15 December 1980 on access to the territory, residence, establishment and removal of foreign nationals), as a family member of a Union citizen, namely of Ms N. E.K.
- 8 On 2 May 2018, her application was rejected, inter alia on the ground that the documents produced as evidence of her lack of means (in particular the Moroccan information sheet from the tax inspector and the Moroccan certificate of lack of means, both dated 2011) and as evidence of financial support from the household (comprising her son and Ms N. E.K.) which she states that she wishes to join (evidence of remittances from 2010 and 2011) are too old to establish her dependency in her country of origin before she lodged her application for family reunification. Moreover, there is nothing in the purchase receipts, sales receipts, invoice reminders and travel insurance certificate from Maroc Assistance Internationale which makes it possible to establish that those expenses were paid by the household which she states that she wishes to join.
- 9 By judgment of 30 August 2019, the Council for asylum and immigration proceedings dismissed the action brought by the appellant. First of all, it recalled that the Court of Justice held, in its judgment of 9 January 2007, *Jia* (C-1/05, EU:C:2007:1), with regard to Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services, '... that "dependent on them" means that members of the family of a Community national established in another Member State within the meaning of Article 43 EC need the material support of that Community national or his or her spouse in order to meet their essential needs in the State of origin of those family members or the State from which they have come at the time when they apply to join the Community national'. The Council for asylum and immigration proceedings decided, in the present case, that the condition of being 'dependent on them' laid down by Article 40a of the Law of 15 December 1980 on access to the territory, residence, establishment and removal of foreign nationals must therefore be understood in the light of the judgment cited above as referring to the fact of having been dependent in the country of origin before coming to Belgium. It also follows that it is not sufficient, for an applicant to be regarded as dependent on the family member he or she is applying to join, for the latter to have sufficient resources or to be living with the applicant; it is also necessary for the applicant to establish that the sponsor's material support was necessary to him or her at the time of the application.
- 10 By appeal of 3 October 2019, the appellant requested that the Conseil d'État (Council of State) set aside that decision.

**2. Provisions at issue:**

**A. *European Union 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*

11 Article 2 provides:

‘Definitions

For the purposes of this Directive:

...

(2) “Family member” means:

- (a) the spouse;
- (b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State;
- (c) ...
- (d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b); ...’

**B. *Belgian law***

*The Law of 15 December 1980 on access to the territory, residence, establishment and removal of foreign nationals.*

12 Article 40a provides:

‘...

(2) The following shall be regarded as family members of a Union citizen:

...

(4) the relatives in the ascending line and the relatives in the ascending line of his or her spouse or partner referred to in points 1 or 2, who are dependent on them, who accompany them or join them; ...’

### **3. Positions of the parties:**

#### **A. *The appellant***

13 The appellant states that the Court of Justice has clarified the concept of a ‘dependant’ in several judgments. It requires real dependence, characterised by the fact that material support for the family member is provided by the Union citizen who has exercised freedom of movement or by his or her spouse. Moreover, the need for material support must exist in the State of origin of the relative in the ascending line or the country whence he or she came at the time when he or she applies to join the EU citizen. That case-law was handed down in a context in which the application for residence was made at practically the same time as the departure from the country of origin. In the present case, the appellant recalls that she left her country of origin in 2011 and lodged her first application for residence based on her status as a relative in the ascending line of a Belgian national a few days later. She then lodged further applications in 2015 and 2017. She maintains that, in order to give practical effect to the right to freedom of movement and in so far as dependency must be assessed in the State from which she has come, account must be taken of evidence relating to material dependency in the country of origin when the application was lodged, and the passage of time cannot alter the quality of that evidence. She takes the view that the judgment under appeal, which holds otherwise, infringes Article 40a(2)(4) of the Law of 15 December 1980 and, in particular, Article 2(2)(d) of Directive 2004/38 and that it is, at the very least, necessary to make a reference to the Court of Justice for a preliminary ruling.

#### **B. *The respondent***

14 The respondent takes the view that the ground of appeal is inadmissible in so far as it alleges infringement of Directive 2004/38 and in that the appellant invites the Council of State to carry out a factual assessment of the probative value of the documents produced. It concludes from this that the proposed questions to be put to the Court are not helpful in resolving the dispute.

### **4. Assessment of the Council of State**

15 The Council for asylum and immigration proceedings dismissed the appellant’s action on the grounds that the concept of a ‘dependant’ must, in accordance with the case-law of the Court of Justice, be examined in the light of the situation existing in the country of origin at the time when the application for residence is brought and that the documents provided by the appellant relate to her situation in 2011 and not to her situation in 2017, the date on which she lodged the application presently at issue.

- 16 In its judgment of 12 December 2019, *Bevándorlási és Menekültügyi Hivatal (Family reunification – Sister of a refugee)*, C-519/18, EU:C:2019:1070, delivered in connection with Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification but in which the Court of Justice expressly refers to the interpretation given to ‘the condition that the family member must be dependent on the sponsor in the context of Directive 2004/38/EC’, the Court of Justice held that:

‘47 ... the status of “dependent” family member of a Union citizen holding a right of residence presupposes that the existence of a situation of real dependence is established. That dependent status is the result of a factual situation characterised by the fact that material support for the family member is provided by the holder of the right of residence (judgments of 19 October 2004, *Zhu and Chen*, C-200/02, EU:C:2004:639, paragraph 43; of 8 November 2012, *Iida*, C-40/11, EU:C:2012:691, paragraph 55; of 16 January 2014, *Reyes*, C-423/12, EU:C:2014:16, paragraphs 20 and 21; and of 13 September 2016, *Rendón Marín*, C-165/14, EU:C:2016:675, paragraph 50).

48 In order to determine the existence of such dependence, the host Member State must assess whether, having regard to his or her financial and social conditions, the family member is not in a position to support himself or herself. The need for material support must exist in the State of origin of the family member or the country whence he or she came at the time when he or she applies to join the EU citizen (see, to that effect, judgments of 9 January 2007, *Jia*, C-1/05, EU:C:2007:1, paragraph 37, and of 16 January 2014, *Reyes*, C-423/12, EU:C:2014:16, paragraphs 22 and 30).’

- 17 However, the Council of State considers that where the foreign national seeking to benefit from family reunification has for many years been present in the territory in which the Union citizen whom that foreign national wishes to be permitted to join is established and has already lodged unsuccessful applications for reunification, as in the present case, the interpretation given by the Court of Justice does not make it possible to determine whether the requirement of being dependent must be assessed in the light of a considerably earlier situation than that of the lodging the application or whether that requirement must necessarily be assessed in the light of the situation existing at the time when that application is brought.

##### **5. The questions referred for a preliminary ruling:**

- 18 The following questions are referred to the Court of Justice of the European Union for a preliminary ruling:

‘1. In the context of the examination of the concept of a dependant for the purposes of Article 2(2)(d) 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, should account be taken of the situation of an applicant who is already in the territory of the State in which the sponsor is established?

2. If the answer to the first question is in the affirmative, should an applicant who is lawfully in the territory of that State be treated differently from an applicant who is there unlawfully?

3. Is Article 2(2)(d) 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 to be interpreted as meaning that, in order to be regarded as a dependant and thus to fall within the definition of ‘family member’ referred to in that provision, a direct relative in the ascending line [may] rely on a situation of real material dependence in the country of origin established by documents which, at the time of lodging the application for a residence card as a family member of a Union citizen, were, however, issued several years previously, on the ground that the departure from the country of origin and the lodging of the application for a residence card in the host Member State did not occur at the same time?

4. If the answer to the third question is in the negative, what are the criteria for assessing the situation of material dependence of an applicant seeking to join a European citizen or his or her partner, as a relative in the ascending line, without having been able to obtain a residence permit on the basis of an application lodged immediately after his or her departure from the country of origin?