

Case C-491/21**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:**

10 August 2021

Referring court:

Înalta Curte de Casație și Justiție (Romania)

Date of the decision to refer:

11 May 2021

Appellant:

WA

Respondent:

Direcția pentru Evidența Persoanelor și Administrarea Bazelor de Date din Ministerul Afacerilor Interne

Subject matter of the main proceedings

Appeal in cassation brought by WA, domiciled in France and residing in Bucharest, Romania, against the judgment of the Curtea de Apel București (Court of Appeal, Bucharest, Romania) by which that court upheld the decision of the national authority, the Direcția pentru Evidența Persoanelor și Administrarea Bazelor de Date din Ministerul Afacerilor Interne (Ministry of the Interior, Romania – Directorate for Personal Records and Managing Databases, ‘the Directorate for Personal Records’), rejecting the appellant’s application for the issue of an identity card or electronic identity card on the ground that he is not domiciled in Romania.

Subject matter and legal basis of the request

Pursuant to Article 267 TFUE, the referring court seeks interpretation of Article 26(2) TFEU, Articles 20, 21(1) and 45(1) of the Charter of Fundamental Rights of the European Union and Articles 4, 5 and 6 of Directive 2004/38.

Question referred for a preliminary ruling

Must Article 26(2) TFEU, Articles 20, 21(1) and 45(1) of the Charter of Fundamental Rights of the European Union and Articles 4, 5 and 6 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 precluding national legislation which does not permit the issue of an identity card – which may serve as a travel document within the European Union – to a national of a Member State on the ground that he has established his domicile in a different Member State?

Provisions of European Union law and case-law relied on

Treaty on European Union: Article 4(3)

Treaty on the Functioning of the European Union: Article 26(2)

Charter of Fundamental Rights of the European Union: Articles 20, 21(1) and 45(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: Articles 4, 5 and 6

Judgments of 8 June 2017, *Freitag*, C-541/15, EU:C:2017:432, paragraph 35; of 1 October 2009, *Gottwald*, C-103/08, EU:C:2009:597, paragraphs 23 to 25, and of 13 June 2019, *TopFit and Biffi*, C-22/18, EU:C:2019:497, paragraphs 27 to 32

Provisions of national law relied on

Ordonanța de urgență a Guvernului nr. 97/2005 privind evidența, domiciliul, reședința și actele de identitate ale cetățenilor români (Government Emergency Ordinance No 97/2005 concerning the registration, domicile, residence and identity documents of Romanian nationals): Articles 12 and 13, which make it compulsory to issue to Romanian nationals aged 14 years and older an identity card certifying their identity, Romanian nationality, domicile and, where applicable, residence, that identity card also constituting a travel document valid for movement between the Member States of the European Union, and Article 20,

which provides for a temporary identity card to be issued to Romanian nationals domiciled abroad who are temporarily residing in Romania.

Legea nr. 248/2005 privind regimul liberei circulații a cetățenilor români în străinătate (Law No 248 of 20 July 2005 on the conditions for the free movement of Romanian nationals abroad): Article 6¹(1), which provides that an identity card constitutes, for Romanian nationals, a valid document for travel between the Member States of the European Union and to third countries which recognise its validity, and Article 34(6), which makes it compulsory for Romanian nationals who have established their domicile abroad to surrender their identity document proving the existence of a domicile in Romania when surrendering a passport mentioning the country of domicile.

Succinct presentation of the facts and procedure in the main proceedings

- 1 WA is a Romanian national who has been domiciled in France since 2014. Accordingly, the Romanian authorities have issued him with a simple electronic passport mentioning that he is domiciled in France. Since WA conducts his private and professional life in both France and Romania, he establishes his residence in Romania each year and is issued with a temporary identity card.
- 2 WA therefore applied to the Romanian authorities (the Directorate for Personal Records) for the issue of an identity card or electronic identity card, but his application was rejected on the ground that he was not domiciled in Romania.
- 3 WA brought an administrative appeal against that decision of the Romanian authorities before the Court of Appeal, Bucharest, which on 28 March 2018 dismissed that appeal as unfounded on the ground that the refusal of the Romanian authorities to issue WA with an identity card was justified by domestic Romanian law, which provides that identity cards are to be issued only to Romanian nationals domiciled in Romania. The court of first instance also declared (i) that national law is not contrary to EU law, since Directive 2004/38 does not require the Member States to issue their own nationals with identity cards, and (ii) that the appellant had not been discriminated against, since the Romanian State had issued him with a passport, which constitutes a valid travel document.
- 4 Subsequently, from 8 to 19 June 2018, WA found that he was unable to leave Romania and travel to France, since he was not in possession of an identity card and his passport was at the Russian Embassy in Bucharest for the purpose of his being issued a visa.
- 5 Against that background, WA brought an appeal in cassation before the referring court, the Înalta Curte de Casație și Justiție (High Court of Cassation and Justice, Romania), challenging the judgment of the Court of Appeal, Bucharest, and alleging the infringement of various provisions of the Treaty on the Functioning of the European Union, of the Charter of Fundamental Rights of the European Union and of Directive 2004/38.

The essential arguments of the parties in the main proceedings

- 6 The appellant considers that both the respondent's refusal to issue him with the requested document and the judgment at first instance upholding that refusal infringe rights enshrined in the Treaty on the Functioning of the European Union (Article 26(2) TFEU, on the free movement of persons and services), in the Charter of Fundamental Rights (Article 20 on equality before the law, Article 21(1) on the prohibition of discrimination, and Article 45(1) on the free movement of Union citizens within the European Union) and in Articles 4, 5 and 6 of Directive 2004/38 on the right to exit, to enter and to reside in the territory of the Member States of the Union.
- 7 Similarly, WA submits that the reasoning of the court of first instance, which solely considered that directive and failed to take account of fundamental rights enshrined in primary law, misconstrued that directive and also infringed the principle of the primacy of EU law over domestic law. Thus, WA considers, first, that, by refusing to reach a finding of discrimination on the ground that if there was discrimination it arose from the law, the court of first instance infringed that principle, which is also enshrined in the Romanian Constitution.
- 8 Secondly, the analysis carried out by the court of first instance is, according to WA, contrary to the spirit and purpose of Directive 2004/38 and to the very concept of discrimination. While Directive 2004/38 does not require the Member States to issue identity cards to their nationals, that directive is infringed as a result of the Romanian State's issuing identity cards solely to Romanian nationals domiciled in Romania, to the exclusion of Romanian nationals domiciled abroad. The proper interpretation of the directive is, according to WA, that the Member States are under no obligation to issue identity cards to their nationals, but, if they decide to do so, they must do so in a non-discriminatory manner.
- 9 WA submits in this connection that the refusal to issue him with an identity card on the ground that he is not domiciled in Romania exemplifies a difference in treatment on the basis of domicile, in respect of which there is no legitimate aim and no proportionality, such that it is contrary to EU law and discriminatory. The appellant maintains that, so long as the Romanian State issues to Romanian nationals domiciled in Romania two travel documents for travel within the European Union and to Romanian nationals domiciled in another Member State of the European Union only one such document, there is discrimination between Romanian nationals, on the basis of whether they are domiciled in Romania or in another Member State of the European Union, as concerns the exercise of the fundamental right of free movement within the Union, which infringes the fundamental right to equal treatment and non-discrimination enshrined in the Charter.
- 10 The appellant adds that the infringement of his rights is not merely theoretical, but is real and effective, inasmuch as, for a period of 12 days in 2018, he was unable to leave Romania and travel to France because his passport, the only travel

document he possesses, was at the Russian Embassy in Bucharest, for the purpose of his obtaining a visa.

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

- 11 In the reasoning in the request for a preliminary ruling, the referring court raises the question of whether the difference in treatment established by the national legislation is compatible with the provisions of EU law on which the appellant relies, including from the perspective of the principle of non-discrimination. Referring to the provisions of Article 4(3) of Directive 2004/38, pursuant to which the Member States, acting in accordance with their laws, are to issue to their own nationals an identity card or passport, the referring court seeks to ascertain whether, by introducing a criterion for distinguishing between its own nationals, namely the criterion of domicile, a Member State is complying fully with the principles underlying the freedom of movement of nationals of the Member States within the European Union.
- 12 First of all, the referring court recalls the provisions of the Constitution in accordance with which EU law is directly applicable and takes precedence over domestic law, as regards both primary law and secondary law, with the consequence that national courts must not apply domestic laws that are contrary to EU law and must instead apply the rules of EU law.
- 13 Next, the referring court observes that there is a difference in treatment on the basis of domicile under national law in so far as, in accordance with that law, for the purpose of travel between the Member States of the European Union, a Romanian national domiciled in Romania will have two travel documents issued by the Romanian State – a passport and an identity card – and will be free to use either one of them, whereas a Romanian national domiciled in another Member State will have only one document issued by the Romanian State, namely a Romanian passport, because a temporary identity card does not also constitute a travel document.
- 14 The referring court points out that, since Directive 2004/38 was aimed at standardising the conditions imposed by the Member States for entry into the territory of another Member State, the national legislation at issue gives effect to a restrictive interpretation of Article 4(3) of that directive, inasmuch as, under national law, Romanian nationals who decide to transfer their domicile to a Member State other than Romania meet with a restriction in the travel documents that they may use. In this connection, the referring court makes reference to paragraphs 31 and 32 of the judgment of 18 December 2014, *McCarthy and Others*, C-202/13, according to which the provisions of Directive 2004/38, the aim of which is to facilitate the exercise of the fundamental right to move and reside freely within the territory of the Member States, cannot be interpreted restrictively or deprived of their effectiveness.

- 15 According to the referring court, it is also irrelevant whether or not a Romanian national domiciled in another Member State is able to obtain a travel document issued by that State. The only thing that matters, from the perspective of observance of the right to free movement, is whether national Romanian legislation complies with EU law. Moreover, the Romanian legislation does not impose as a condition for the surrender of a permanent identity card proof that the individual established in another Member State has the benefit in that State of a similar travel document.
- 16 As regards the criterion of domicile, the referring court makes reference to the case-law of the Court of Justice on that subject, as well as the provisions of the Charter, and considers that the list of discrimination criteria in [Article 21] of the Charter is merely illustrative, and not exhaustive. In this connection it refers, first, to paragraph 35 of the judgment of 8 June 2017, *Freitag*, C-541/15, according to which national legislation which places certain of the nationals of the Member State concerned at a disadvantage simply because they have exercised their freedom to move and to reside in another Member State is a restriction on the freedoms conferred by Article 21(1) TFEU.
- 17 Secondly, it recalls the judgment of the Court of Justice of 1 October 2009, *Gottwald*, C-103/08 (paragraphs 23 to 25), which concerns the equal treatment of citizens of the European Union and the prohibition of discrimination based on nationality in all situations falling within the material scope of EU law, including those involving the exercise of the right to move and reside within the territory of the Member States. According to that judgment, the rules on the equal treatment of nationals and non-nationals prohibit not only overt discrimination by reason of nationality, but also covert forms of discrimination which, by the application of other distinguishing criteria, lead to the same result. That will be the case, in particular, where a provision is introduced which makes a distinction on the basis of the criterion of domicile or residence.
- 18 Thus, the referring court considers that the criterion of domicile could constitute a ground of discriminatory treatment which, in order to be justified under EU law, would have to be based on objective reasons independent of the nationality of the individual concerned and proportionate to the objective legitimately pursued by national law.
- 19 The referring court has been unable to identify any objective reason of general interest that might justify the difference in treatment, and the respondent has not suggested any. It also observes that the difference in treatment in question does not appear to be proportionate in the sense of being suitable for achieving the objective pursued and not going beyond what is necessary to achieve it.
- 20 The referring court also makes reference to the ruling in the judgment of 13 June 2019, *TopFit and Biffi*, C-22/18 (paragraphs 27 to 32), which concerned an Italian national, resident in Germany, who had exercised his right to free movement within the meaning of Article 21 TFEU.

- 21 Finally, referring to the *CILFIT* case-law on the admissibility of references for a preliminary ruling, the referring court considers that, in the present case, there is reasonable doubt as to the correct interpretation of the EU law relied on, given that it has not been able to identify any provision of Directive 2004/38 or any case-law of the Court of Justice which deals with the difference in treatment of which the appellant complains.

WORKING DOCUMENT