

Recent developments in EU case-law with regard to free movement of third- country nationals

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Introduction

- Directive 2004/38/EC: migrating EU citizens and their family members,
- Article 2(2): definition of a family member,
- Article 3(2): possible extension to other family members,
- Articles 9-15: administrative requirements, retention of rights, procedural safeguards,
- Articles 18 & 20: permanent right of residence
- Articles 27 et al: restrictions.

Recent case-law: SM

- Case C-129/18 *SM v Entry Clearance Officer, UK Visa Section*, ECLI:EU:C:2019:248,
- Facts: reference from the UK Supreme Court submitted in proceedings between SM, an Algerian national, and the Entry Clearance Officer, UK Visa Section, concerning the latter's refusal to grant SM entry clearance for the territory of the UK as an adopted child of a national of the European Economic Area.

Recent case-law: SM

- Facts: action submitted by two French citizens, who wished to register as a descendant (Article 2(2)c of Directive 2004/38) a child of Algerian nationality, placed in their guardianship in Algeria under the *kafala* system,
- AG Campos Sánchez-Bordona: under the circumstances the child does not fall under the definition of "direct descendant" as per Article 2(2)c of Directive 2004/38/EC,
- However, Article 3(2)a of Directive 2004/38/EC may be applicable,
- National court should take into account the protection of family life and the defence of the child's best interests.

Recent case-law: SM

- Court of Justice (Grand Chamber): agreed with the Advocate General,
- NOTE: Court of Justice indicated that Article 3(2)a of Directive 2004/38/EC should be interpreted in the light of Article 24(2) of the Charter of Fundamental Rights (rights of children).

Recent case-law: *Chenchooliah*

- Case C-94/18 *Nalini Chenchooliah v Minister for Justice and Equality*, ECLI:EU:C:2019:693,
- Facts: reference for preliminary ruling from the High Court (Ireland) in case between Ms Nalini Chenchooliah, a third-country national, and the Minister for Justice and Equality (Ireland), concerning a decision to deport Ms Chenchooliah following the return of her spouse, a Union citizen, to the Member State of which he is a national, where he is serving a prison sentence.

Recent case-law: *Chenchooliah*

- Advocate General Szpunar: Articles 15, 30 and 31 of Directive 2004/38/EC apply to a decision to expel a third-country national adopted on the ground that that national no longer has a right of residence under that Directive, in a situation in which that national married a Union citizen at a time when that citizen was exercising his freedom of movement by moving to and residing in a Member State other than the Member State of which he is a national pursuant to Article 6(1) of that Directive, that citizen having subsequently returned to the Member State of which he is a national.

Recent case-law: *Chenchooliah*

- Court of Justice (Grand Chamber): agreed with the Advocate General,
- Article 15 of Directive 2004/38/EC applies, as well as relevant safeguards laid down in Articles 30 and 31 of Directive 2004/38, when such an expulsion decision is adopted and it is not possible, under any circumstances, for such a decision to impose a ban on entry into the territory.

Recent case-law: *Bajratari*

- Case C-93/18 *Ermira Bajratari v Secretary of State for the Home Department*, ECLI:EU:C:2019:809,
- Facts: reference for preliminary ruling submitted by the Court of Appeal in Northern Ireland in case between Ermira Bajratari and the Secretary of State for the Home Department (United Kingdom) concerning Mrs Bajratari's right of residence in the United Kingdom,
- Article 7(1)(b) of Directive 2004/38/EC was at the heart of reference.

Recent case-law: *Bajratari*

- Advocate General Szpunar: Article 7(1)b of Directive 2004/38 means that a young child, who is a Union citizen, has sufficient resources not to become a burden on the social assistance system of the host Member State during his period of residence where, in circumstances such as those of the case in the main proceedings, those resources are provided from income derived from the activity unlawfully carried on in that Member State, without a residence or work permit, by the child's father, a national of a third country,
- Court of Justice agreed with the Advocate General.

Recent case-law: *RH*

- Case C-836/18 *Subdelegación del Gobierno en Ciudad Real vRH*, ECLI:EU:C:2020:119
- Facts: reference for preliminary ruling submitted by the High Court of Justice of Castilla-La Mancha, Spain concerning Mr. H's right of residence in Spain,
- The key issue was interpretation of Article 20 TFEU and the extent to which it gave the right to reside to third country nationals.

Recent case-law: *RH*

- The Court of Justice held that:
 - Article 20 TFEU precludes a Member State from rejecting an application for family reunification submitted by the spouse, who is a third-country national, of a Union citizen who holds the nationality of that Member State and who has never exercised the freedom of movement, on the sole ground that that Union citizen does not have, for him or herself and his or her spouse, sufficient resources not to become a burden on the national social assistance system, without it having been examined whether there is a relationship of dependency between that Union citizen and his or her spouse of such a kind that, if the latter were refused a derived right of residence, that Union citizen would be obliged to leave the territory of the European Union as a whole and would thus be deprived of the effective enjoyment of the substance of the rights conferred by his or her status.

Recent case-law: *RH*

- The Court of Justice held that:
 - Article 20 TFEU must be interpreted as meaning that a relationship of dependency, such as to justify the grant of a derived right of residence under that article, does not exist on the sole ground that the national of a Member State, who is of full age and has never exercised the freedom of movement, and his or her spouse, who is of full age and a third-country national, are required to live together, by virtue of the obligations arising out of the marriage under the law of the Member State of which the Union citizen is a national.