OPINION OF ADVOCATE GENERAL
Sharpston
delivered on 12 December 2013 (1)

Case C-456/12

Minister voor Immigratie, Integratie en Asiel
v
O

Case C-457/12

Minister voor Immigratie, Integratie en Asiel
v
S

(Requests for a preliminary ruling from the Raad van State (Netherlands))

(Right of non-EU citizens to reside in the Member State of nationality and residence of the EU citizen with whom they share family ties)

1. Four third country nationals ('O', 'B', 'S' and 'G') each have family ties to a different Netherlands national (and thus EU citizen) who is their sponsor. They all seek lawful residence in the Netherlands where their respective sponsors reside. In each case, the sponsor has moved across borders with other Member States, for work or other reasons. The Raad van State (Council of State) (Netherlands) in essence asks the Court whether such movement suffices to establish that EU law applies and to generate a derived right of residence in the Netherlands for those third country nationals.

2. O, B and G are married to, respectively, 'sponsor O', 'sponsor B' and 'sponsor G'. Sponsor O and sponsor B have previously spent time in other Member States but did not work there. Sponsor G is employed by a Belgian employer and travels daily to work in Belgium. G and sponsor G have children. S has a son-in-law ('sponsor S') who is employed by a Netherlands employer but spends approximately 30% of his time on preparing and making business visits in Belgium. S cares for sponsor S's son in the Netherlands.

Legal background

EU law

Treaty on the Functioning of the European Union

3. Article 20(1) TFEU establishes EU citizenship and provides that '[e]very person holding the nationality of a Member State' is an EU citizen. In accordance with Article 20(2)(a), EU citizens have 'the right to move and reside freely within the territory of the Member States'.

4. Article 21(1) TFEU adds that that right is 'subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect'.

5. Article 45 TFEU guarantees freedom of movement for workers, which entails 'the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment'.

6. According to Article 56(1) TFEU, '… restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended'.

Charter of Fundamental Rights of the European Union

7. Article 7 of the Charter of Fundamental Rights of the European Union ('the Charter') is entitled 'Respect for private and family life' and states that '[e]veryone has the right to respect for his or her private and family life …'.

8. Article 51 defines the field of application of the Charter:

'1. The provisions of this Charter are addressed … to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.

…'

Directive 2004/38/EC (2)

9. Recital 1 in the preamble to Directive 2004/38 mimics the terms of Article 21(1) TFEU. Recital 3 states that, when nationals of Member States exercise their right of free movement and residence, 'Union citizenship should be [their] fundamental status …'.

10. According to recital 5, '[t]he right of all Union citizens to move and reside freely within the territory of the Member States should, if it is to be exercised under objective conditions of freedom and dignity, be also granted to their family members, irrespective of nationality …'.

11. Article 1(a) states that Directive 2004/38 lays down, inter alia, 'the conditions governing the exercise of the right of free movement and residence within the territory of the Member States by Union citizens and their family members'.

12. For the purposes of Directive 2004/38, a 'Union citizen' is 'any person having the nationality of a Member State' (Article 2(1)), and a 'family member' includes 'the spouse' (Article 2(2)(a)) and 'the dependent direct relatives in the ascending line and those of the

spouse …' (Article 2(2)(d)) of the Union citizen. The 'host Member State' is 'the Member State to which a Union citizen moves in order to exercise his/her right of free movement and residence' (Article 2(3)).

13. Article 3(1) provides that Directive 2004/38 is to apply to 'all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them'.

14. With regard to other family members who satisfy the conditions in Article 3(2)(a) and a partner with whom an EU citizen has a durable relationship, duly attested, Article 3(2) states that '… the host Member State shall … facilitate entry and residence …' of these persons.

15. Article 6(1) states that EU citizens must have the right to reside in another Member State for up to three months. They need only hold a valid identity card or passport and no other conditions or formalities may apply. According to Article 6(2), the same rules apply '… to family members in possession of a valid passport who are not nationals of a Member State, accompanying or joining the Union citizen'.

16. An EU citizen and his family members (who are not nationals of a Member State) also enjoy a right of residence for more than three months in the host Member State if that EU citizen satisfies the conditions set out in Article 7(1)(a), (b) or (c) namely: (a) he must be a worker or self-employed person in the host Member State, or (b) he must have sufficient resources for himself and his family members and comprehensive sickness insurance cover in the host Member State, or (c) he must be a student and have sufficient resources and comprehensive sickness insurance cover.

17. According to Article 16(1), eligibility for the right of permanent residence requires lawful residence for a continuous period of five years in the host Member State.

18. Under Article 35, Member States may refuse, terminate or withdraw any right conferred under Directive 2004/38 in the case of abuse of rights or fraud. Any measure necessary for that purpose must be proportionate and respect the procedural safeguards in Articles 30 and 31.

Netherlands law

19. The Vreemdelingenwet 2000 (Law on Foreign Nationals of 2000, hereafter 'Vw 2000') defines 'Community nationals' as nationals of the Member States and third country national family members who are entitled to enter and reside in the territory of another Member State on the basis of (what is now) the TFEU (with respect to the former) or a decision taken in application of that Treaty (with respect to the latter). Such third country nationals can obtain from the Minister voor Immigratie, Integratie and Asiel ('the Minister for Immigration, Integration and Asylum' or 'the Minister') a document or written statement certifying lawful residence. If the Minister has declared a third country national to be 'undesirable', he may, at the request of the person concerned, lift that declaration. The relevant conditions are set out in the Vreemdelingenbesluit (Decree on Foreign Nationals), which implements the Vw 2000.

20. A fixed-term residence permit is granted subject to restrictions relating to the purpose for which residence is authorised. Other conditions may also attach to the permit.

Facts

Case C-456/12 O

The case of O

21. In October 2006, O, a Nigerian national, married sponsor O in France. He took up residence in Spain in 2007. Since August 2009, O and sponsor O have been registered as residing there together. A residence document valid until September 2014 attests that O resides in Spain in his capacity as a family member of an EU citizen.

22. However, two months after arriving in Spain, sponsor O in fact returned to the Netherlands because she could not find work in Spain. From 2007 to April 2010, she none the less repeatedly spent time, mostly weekends, in Spain with O and, during those visits, enjoyed services there. Since 1 July 2010, O has been registered as residing with sponsor O in the Netherlands.

23. It would appear that there is no evidence that, during all of this time, sponsor O cancelled her residence registration in the Netherlands.

24. O applied for a document showing lawful residence. The Minister rejected that request and declared unfounded O's challenge to that decision. O appealed to the rechtbank 's-Gravenhage (District Court, the Hague; 'the rechtbank') which, on 7 July 2011, rejected the appeal. O then appealed against that judgment to the referring court.

The case of B

25. B is a Moroccan national. From December 2002, he lived together with sponsor B in the Netherlands for several years. At the time they were not married. It seems that they met whilst B was awaiting a decision on his asylum request. That request was rejected.

26. After B was sentenced to two months' imprisonment for using a false passport, the Minister declared, on 15 October 2005, B to be an undesirable alien. B then moved in January 2006 to Retie (Belgium) and lived there in an apartment rented by sponsor B. It seems that sponsor B initially resided there alone and that B joined her after his release from prison. Sponsor B was registered as residing in Retie with a residence permit valid until 18 May 2011. However, she was unable to find work in Belgium. She therefore kept her house in the Netherlands and stayed there during the week when working in the Netherlands, whilst spending weekends with B in Belgium. During those weekends, she enjoyed services in Belgium. Although they had intended to marry in Belgium, in fact they only got married later, in Morocco.

27. In April 2007, B moved to Morocco because he could no longer reside in Belgium after the Belgian authorities discovered that he was the subject of a declaration of undesirability in the Netherlands. On 31 July 2007, B and sponsor B were married in Morocco.

28. At B's request, the Minister lifted the declaration of undesirability in March 2009. In June 2009, B returned to the Netherlands to reside there with sponsor B.

29. On 30 October 2009, B's request for a document showing lawful residence was refused. In March 2010, the Minister declared unfounded both his challenge to that refusal and his objection to the placing of a sticker in his passport stating that he did not have permission to work.

30. B appealed against both decisions to the rechtbank, which set them aside and ordered the Minister to decide afresh on the challenge. In December 2010, the Minister issued a new decision to the same effect as his previous decision and appealed to the referring court against the decision of the rechtbank.

Case C-457/12 S

The case of S

31. S is a Ukrainian national. Her son-in-law, sponsor S, has worked since 2002 for an employer established in the Netherlands who has declared that sponsor S spends 30% of his time on preparing and making business trips to Belgium. Sponsor S goes there at least one day a week and also visits clients and attends conferences in other Member States. S further declared that she takes care of sponsor S's son (her grandson).

32. S applied for a document certifying lawful residence. In August 2009, her application was rejected. The Minister dismissed her challenge to that decision. In June 2010, the rechtbank rejected her appeal. S then appealed against that judgment to the referring court.

The case of G

33. G is a Peruvian national. She married sponsor G in Peru in 2009. Sponsor G lives in the Netherlands but has worked for a Belgian employer since 2003. He travels daily to and from Belgium for his work.

34. G's application for a document certifying lawful residence was rejected in December 2009. Her challenge was dismissed by the Minister. In June 2011, the rechtbank upheld G's appeal, ordering the Minister to decide anew on the challenge. The Minister appealed against that judgment to the referring court. Before that court, G stated that she and her spouse have a child (who is a Netherlands national) and that a child she had before marrying Sponsor G also forms part of their new family.

Procedure and questions referred

35. In Case C-456/12 *O*, the referring court asks:

'In [the] cases [involving B] and [involving O]:

(1) Should Directive 2004/38 …, as regards the conditions governing the right of residence of members of the family of a Union citizen who have third-country nationality, be applied by analogy, as in the judgments of the Court of Justice of the European Communities in Case C-370/90 *Singh* [(3)] … and in Case C-291/05 *Eind* [(4)] …, where a Union citizen returns to the Member State of which he is a national after having resided in another Member State in the context of Article 21(1) [TFEU], and as the recipient of services within the meaning of Article 56 [TFEU]?

(2) If so, is there a requirement that the residence of the Union citizen in another Member State must have been of a certain minimum duration if, after the return of the Union citizen to the Member State of which he is a national, the member of his family who is a third-country national wishes to gain a right of residence in that Member State?

(3) If so, can that requirement then also be met if there was no question of continuous residence, but rather of a certain frequency of residence, such as during weekly residence at weekends or during regular visits?

In [the] case [involving B]:

(4) As a result of the time which elapsed between the return of the Union citizen to the Member State of which he is a national and the arrival of the family member from a third country in that Member State, in circumstances such as those of the present case, has there

been a lapse of possible entitlement of the family member with third-country nationality to a right of residence derived from Union law?'

36. In Case C-457/12 *S*, the referring court asks:

'(1) In [the] case [involving G]:

Can a member, having third-country nationality, of the family of a Union citizen who lives in the Member State of which he is a national but who works in another Member State for an employer established in that other Member State derive, in circumstances such as those of the present case, a right of residence from Union law?

(2) In [the] case [involving S]:

Can a member, having third-country nationality, of the family of a Union citizen who lives in the Member State of which he is a national but who, in the course of his work for an employer established in that same Member State, travels to and from another Member State derive, in circumstances such as those of the present case, a right of residence from Union law?'

37. Written observations have been submitted by O, B, G, the Governments of Belgium, the Czech Republic, Denmark, Estonia, Germany, the Netherlands and the United Kingdom, and the European Commission. At the joint hearing, held on 25 June 2013, the same parties, with the exceptions of G and the Governments of Belgium and Estonia, and S presented oral argument.

Assessment

Preliminary remarks

38. Immigration law is, in principle, a matter of Member State competence. Unless the situation is one in which a national of a Member State (who, through his nationality, is also an EU citizen) has crossed a border with another Member State or there is a real prospect of him doing so, EU rights of free movement and residence are not in principle triggered and national law alone applies. (5)

39. However, in the present cases, each of the EU sponsors, although resident in the Netherlands, has indeed crossed such a border. They have done so for work or for leisure; they have (presumably) exercised the 'passive' right to receive services there; they have, in some cases, been registered formally as residing in another Member State whilst retaining some form of residence in the Member State of nationality (the 'home Member State'). Does it follow that EU law then precludes their home Member State from refusing to grant a right of residence to their family members (O, B, S and G)? And does it matter if sponsor and family member do not return together to the sponsor's home Member State?

40. It is clear that the sponsors themselves enjoy an unconditional right of residence in their home Member State by virtue of national law. (6) A Member State is precluded 'from expelling its own nationals from its territory or refusing their right to reside in that territory or making such right conditional'. (7) However, nationals' entry and residence in their home Member State are also subject to EU law in so far as this is necessary to ensure the full effectiveness of their fundamental freedoms of movement and residence under EU law. (8)

41. Any derived right of residence that O, B, S and G may enjoy under EU law would not be absolute, but would be governed by the conditions and limitations set out in EU law. For

that reason, I shall consider separately the right of residence and then the conditions and limitations governing its exercise.

42. There is no material before the Court to indicate whether O, B, S and G might be able to claim a right of residence under national law, including national law protecting fundamental rights, or under the European Convention on Human Rights ('the ECHR'). On the facts, there is no suggestion that any of the marriages were marriages of convenience or that there has been fraud or abuse of rights. In other circumstances, a finding of such abuse might well make it unnecessary to consider further whether a derived right of residence could legitimately be refused. However, the mere fact that at some point both O and sponsor O and B and sponsor B have moved to another Member State where more favourable treatment was guaranteed is not an abuse of rights. (9)

43. My focus in this Opinion is on whether denying lawful residence to third country nationals such as O, B, S and G is a restriction of the right of their sponsors to move and reside freely within the territory of the Member States. Any such restriction might, in theory, be justified. However, the Court has no information which would enable it to assess such a justification.

44. Finally, I shall try in this Opinion to develop a coherent explanation of the parameters within which derived residence rights for third country national family members arise in the home Member State of an EU citizen who has exercised free movement rights without necessarily exercising (full) residence rights in another Member State. An ad hoc solution that does not clearly identify the relevant parameters, whilst it might assist the national court to dispose of these four individual cases, would risk adding to the present uncertainty amongst practitioners and national administrations as to whether EU law can (or cannot) be invoked; with the concomitant risk that there may be significant 'repeat business' as national courts seek further clarification through further references.

Why derived rights of residence exist

45. Articles 20(2)(a) and 21(1) TFEU grant EU citizens the right to move and reside freely within the territory of the Member States. The essence of that right is the freedom to choose whether or not to move to another Member State and/or to reside there. Measures that restrict that choice are, unless justified, contrary to those provisions.

46. The concept that family members of such EU citizens should enjoy derived rights of residence was developed in the context of the economic freedoms of movement, in particular those of migrant workers. Workers are human beings, not automata. They should not have to leave behind their spouse or other family members, in particular those who are dependent on them, in order to become migrant workers in another Member State. (10) If they cannot bring their family with them when they move, they might be discouraged from exercising those rights of free movement. Moreover, the family's presence can help a worker to integrate in the host State and therefore contribute to successful free movement. (11)

47. With the introduction of EU citizenship in the Maastricht Treaty, nationals of a Member State acquired the right to move and reside freely within the territory of other Member States independently from the economic freedoms of movement and thus the pursuit of economic activity. (12) Just as with migrant workers, the effectiveness of EU citizens' freedoms of movement and residence can depend on whether certain family members have the right, as a matter of EU law, to join or accompany them in the territory to where they moved or where they reside. As the Court put it recently, '[t]he purpose and justification of those derived rights are based on the fact that a refusal to allow them would be such as to interfere with the Union citizen's freedom of movement by discouraging him from exercising his rights of entry into and residence in the host Member State'. (13)

48. Under Directive 2004/38, the existence of a derived right of residence no longer depends on showing the possible effect on the EU citizen of denying family members residence. (14) The rationale for granting derived rights of residence is however reflected in the fact that such rights are available automatically only to a select group of family members whose ability to join or accompany EU citizens is presumed by the legislature to affect his choice, and thus the exercise of his right, to move. Directive 2004/38 therefore distinguishes between the nuclear family and other family members. The nuclear family comprises the EU citizen, his or her spouse or registered partner and their direct descendants under the age of 21. These family members have automatic derived rights of residence. Direct descendants over the age of 21 and direct ascendants of EU citizens (or of their spouses or registered partners), however, need to satisfy the condition of dependency in order to claim a derived right of residence. In the context of Directive 2004/38, it seems to me that dependency has been interpreted narrowly so as to focus on whether an EU citizen materially supports these family members. (15) Whilst such dependency undoubtedly can be highly indicative of the extent to which denying residence interferes with the exercise of rights of free movement and residence, the Court has indicated – *outside* the context of Directive 2004/38 – that dependency can also be measured using indicators of legal or emotional ties or that it can be relevant that an EU citizen is dependent on a third country national family member ('reverse dependency'). (16)

What generates derived rights of residence

49. In the current state of EU law, derived rights of residence in principle only exist where these are necessary to ensure that EU citizens can exercise their free movement and residence rights effectively. The first question is therefore whether a particular EU citizen has exercised or is exercising such rights. If so, the second question is whether denying their family members residence will restrict the exercise of those rights (if there is no restriction, there is no reason to grant derived rights of residence). The referring court therefore asks in essence whether it is necessary to consider the type and intensity of an EU citizen's exercise of his rights of free movement and residence before turning to that second question.

50. The Court has consistently held that the rules governing freedom of movement cannot be applied to cases which show no actual connection with situations governed by EU law. (17) A purely hypothetical prospect of exercising such rights or of their being obstructed is not sufficient to establish the necessary connection. (18)

51. Here, sponsors O, B, S and G have all exercised rights of free movement and/or residence within the meaning of Article 21 TFEU. These cases do not therefore concern wholly internal situations which fall outwith the scope of EU law. That is sufficient to render EU law applicable; but does not automatically lead to the conclusion that O, B, S and G have a claim under EU law to lawful residence in the Netherlands.

52. Precisely because there has been movement across borders, the facts underlying these cases distinguish them from cases such as *Ruiz Zambrano*, *McCarthy* or *Dereci*, where the Court held that, exceptionally, a connection with EU law and a basis for derived rights of residence under Article 20 TFEU can exist without any exercise of the rights of free movement to, or residence in, another (host) Member State, if a national measure would oblige EU citizens (including a Member State's own nationals) to leave the territory of the European Union. (19) In *Iida*, which involved two German nationals who had moved to Austria and a Japanese national seeking residence in Germany, the Court then made it clear that this test was not limited to situations that otherwise would be classified as purely internal. (20)

53. In *Ruiz Zambrano* the Court accepted that denying the father residence would deprive his minor children of 'the genuine enjoyment of the substance of the rights conferred by

virtue of their status as citizens of the Union'. (21) In particular, it would cause them to leave the territory of the European Union. (22)

54. The opposite conclusion was reached in *McCarthy* with regard to Mrs McCarthy's Jamaican husband. Mrs McCarthy was a dual national of the United Kingdom and Ireland who had always lived in the United Kingdom. She had never visited Ireland or exercised rights of free movement elsewhere in the European Union, and had applied for the Irish passport to which she was legally entitled only after marrying a Jamaican national in the United Kingdom. Nor did she claim to be a worker, self-employed person or self-sufficient person. Her husband was refused residence in the United Kingdom as the spouse of an EU citizen with a nationality other than that of the United Kingdom. (23)

55. In *Dereci*, the Court clarified that denial of the genuine enjoyment of the substance of EU citizenship rights corresponded to the situation 'in which the Union citizen has, in fact, to leave not only the territory of the Member State of which he is a national but also the territory of the Union as a whole'. (24) That situation was described by the Court as exceptional. (25) The Court did not elaborate on what circumstances might oblige an EU citizen to leave the territory of the European Union, though it held that 'the mere fact that it might appear desirable to a national of a Member State, for economic reasons or in order to keep his family together in the territory of the Union' for residence rights to be granted was insufficient in itself to conclude that denial of residence would cause such departure. (26) Such factors thus do not show that denying residence will result in the loss of an EU citizenship right, that is, the right to reside in the territory of the European Union.

56. However, the Court did not exclude the possibility, leaving aside Articles 20 and 21 TFEU, that a national court might require residence to be granted on the basis of Article 7 of the Charter (for situations falling within the scope of EU law) or Article 8(1) of the ECHR (for other situations). (27) Thus, when a third country national with family ties to an EU citizen cannot derive a right of residence from EU law, a national court might nevertheless conclude that, where a situation is covered by EU law, the right to respect for family life requires him to be granted a residence right.

57. I find that passage puzzling inasmuch as it might be read as suggesting that there the Court recognised three separate bases under EU law: the right to respect for private and family life (Article 7 of the Charter); the right of free movement and residence (Article 21(1) TFEU) and the denial of the genuine enjoyment of the substance of the rights conferred on an EU citizen (Article 20 TFEU). For situations not falling within the scope of EU law, the right to respect for private and family life under Article 8 of the ECHR might form another basis for establishing a right of residence.

58. If that is what the Court intended, the Court has yet to resolve whether one applies the same test in order to determine both whether EU law (and thus also the Charter) applies and whether a measure denying residence is contrary to Article 20 or 21 TFEU. (28)

59. However, I believe that there is a different way of approaching the matter.

60. The Charter applies only if EU law applies. (29) Thus, the Charter does not apply to an internal situation, such as that of Mrs McCarthy, in which an EU citizen is neither impeded in exercising rights of free movement and residence under EU law nor deprived of the separate core citizenship right to reside on the territory of the Union by the national measure. In such situations, it is clear that, at present at least, the Charter does not grant 'free-standing' fundamental rights – that is, rights that have no point of attachment to what lies within the competence of the Union – which can then be used in order to require a national

court to disapply a national measure which operates to the EU citizen's disadvantage in arranging his family life as he would wish.

61. Thus, if it is not possible to identify a pertinent provision of EU law, the Charter does not bite. To put the same point slightly differently, it is necessary to look at a legal situation through the prism of the Charter if, *but only if*, a provision of EU law imposes a positive or negative obligation on the Member State (whether that obligation arises through the Treaties or EU secondary legislation). (30)

62. If and to the extent that a given situation concerning EU citizens falls within the scope of EU law, the interpretation given to any provision of EU law that grants rights to those citizens (and which thus imposes an obligation on Member States to respect those rights) must be consistent with any pertinent Charter rights, (31) including the right to respect for private and family life guaranteed by Article 7 of the Charter. That means that a provision such as Article 20 or 21 TFEU is not simply a basis for residence status separate from Article 7 of the Charter. Rather, considerations regarding the exercise of the right to a family life permeate the substance of EU citizenship rights. Citizenship rights under Article 20 or 21 TFEU must thus be interpreted in a way that ensures that their substantive content is 'Charter-compliant'. That process is separate from the question of whether a justification advanced for a restriction of EU citizenship rights, *where these are triggered*, is consistent with the Charter. (32)

63. Such an approach does not 'extend' the scope of EU law and thus violate the separation of competences between the Union and its constituent Member States. It merely respects the overarching principle that, in a Union founded on the rule of law, all the relevant law (including, naturally, relevant primary law in the shape of the Charter) is taken into account when interpreting a provision of that legal order. When viewed in that light, taking due account of the Charter is no more 'intrusive', or 'disrespectful of Member State competence', than interpreting free movement of goods correctly.

64. Moreover, if the Charter applies and where rights laid down in the Charter correspond to rights already covered by the ECHR, EU law must be interpreted taking into account the case-law of the European Court of Human Rights ('the Strasbourg court'). (33) Article 7 of the Charter, protecting the right to a family life, is such an article; and there is abundant case-law of the Strasbourg court that clarifies the meaning to be attributed to its ECHR counterpart (Article 8 ECHR).

65. It follows that it should be immaterial whether one considers whether application of a particular national measure would breach Article 7 of the Charter or Article 8 ECHR. The standard being applied (whether by the national court, by this Court or by the Strasbourg court) is, by definition, the same. It should therefore be impossible to arrive at a different conclusion depending on which is invoked. (For present purposes I leave aside the third component in the trilogy of sources of protection of fundamental rights, namely national constitutional law, which may also of course be pertinent.)

66. In the context of a reference for a preliminary ruling, it is obviously necessary for this Court to give clear guidance to the national court as to the circumstances in which an EU right, read in a Charter-compliant way, is triggered. By the same token, it will be for the national court – which alone is competent to assess the facts – to make the necessary detailed assessment of those facts and to determine, on the basis of that guidance, whether the EU right as so interpreted precludes application of the national measure. In so doing, the national court will be performing the same exercise in respect of the claim that 'otherwise my fundamental rights will be breached' as it is accustomed to carry out when evaluating a similar claim under the ECHR in the light of the case-law of the Strasbourg court.

Applicability of Directive 2004/38

67. Directive 2004/38 implements Article 21(1) TFEU. It is aimed at facilitating and strengthening the exercise of that primary and individual right to move and reside. (34) According to settled case-law, such secondary legislation cannot be interpreted restrictively (35) and its provisions 'must not in any event be deprived of their effectiveness'. (36)

68. Only a beneficiary within the meaning of Article 3 of Directive 2004/38 can derive rights of free movement and residence under that directive. Such a beneficiary may be an EU citizen or a family member as defined in Article 2(2). (37)

69. However, whilst Directive 2004/38 applies to defined categories of family members of an EU citizen and irrespective of whether they have already resided lawfully in another Member State (38) or have resided at all in a Member State, (39) their rights are acquired through their status as family members of the EU citizen concerned. (40) In that sense, they are automatic. (41) Thus, the EU citizen with whom they share a family connection must first fall within the scope of that directive.

70. It is not contested that O, B, S and G are family members within the meaning of Article 2(2)(a) and (d) of Directive 2004/38. That fact is sufficient: it is not necessary to show that there would otherwise be a restrictive effect on EU citizenship rights of free movement and residence in order to establish that, if Directive 2004/38 applies, they would have a derived right of residence. (42) The problem lies elsewhere.

71. Article 3(1) applies to all EU citizens 'who move to *or* reside in' a Member State other than that of their nationality. (43) In order to reside in a Member State, an EU citizen who was not born there must normally move there. (44) By contrast, movement to a Member State is possible without residing there. In that case, an EU citizen exercises only his right of free movement and not that of residence. Only those provisions of Directive 2004/38 regarding exit and entry will then apply. In principle, third country nationals cannot derive from EU law a right of residence in a Member State if their family member who is an EU citizen does not himself claim a right of residence and does not reside there. (45) There is thus an element of parallelism between an EU citizen's rights and the derived rights of his family members.

72. Third country nationals can claim such a right in the host Member State only when they accompany or join the EU citizen who exercises the right to reside on that territory in accordance with the conditions set out in Articles 6(1), 7(1) or 16(1) of Directive 2004/38. (46)

73. Article 3(1) makes no distinction according to the purpose of the exercise of the rights of free movement and residence, though the conditions under which rights of residence of longer than three months can be exercised differ depending on whether the EU citizen is, or is not, a migrant worker or self-employed person. (47) Indeed, the very purpose of Directive 2004/38 was to remedy the previous piecemeal approach to those rights whilst maintaining certain advantages for those EU citizens who pursue economic activities in another Member State. (48)

74. None the less, the wording of Article 3(1) circumscribes the scope of Directive 2004/38 by the direction in which EU citizens move: to a Member State other than that of which they are nationals. (49)

75. Thus, in principle, EU citizens who have always resided in their home Member State and have never exercised rights of free movement cannot be beneficiaries within the meaning of Article 3(1) of Directive 2004/38. (50) As a result, nor can their family members.

76. None of the sponsors in the present cases are in that situation. They all have exercised at least some form of the right of free movement.

77. In general, EU citizens can move in three directions within the European Union: (i) between two Member States of which they are not nationals; (ii) from their home Member State to another Member State and (iii) from another Member State back to their home Member State. They may of course move several times and in different directions. (51)

78. It is clear that Directive 2004/38 applies to movements (i) and (ii). In those circumstances, a third country national who is a family member of the EU citizen (who has moved in either direction) has the right to accompany or join that EU citizen. (52)

79. However, it does not apply to movement (iii). Although I am firmly of the view that an EU citizen (and any third country national family members) having benefited from protection under Directive 2004/38 should not lose that protection when moving a second time, (53) concluding otherwise in respect of the scope of application of Directive 2004/38 itself would mean striking out the phrase 'other than that of which they are a national' from Article 3(1).

80. I add that, if the legislature had intended to cover movement (iii), it would have needed to write in detailed provisions to address that situation. There are none.

81. In *McCarthy*, the Court almost said as much when it held that 'Directive 2004/38 … cannot apply to a Union citizen who enjoys an unconditional right of residence due to the fact that he resides in the Member State of which he is a national'. (54) In *Iida*, Advocate General Trstenjak took the view that Directive 2004/38 did 'not at all cover the present case of the right of residence of the third country national in the Member State of origin of the Union citizen', (55) though she appears not to exclude outright the possibility that the answer might be different in different circumstances. (56)

82. It is true that the Court in *Singh* (57) accepted derived rights of residence for family members of a returning migrant worker on the basis of Article 52 of the EEC Treaty (now Article 59 TFEU) and Directive 73/148 (58) (repealed and replaced by Directive 2004/38 (59)). Directive 73/148, like Directive 2004/38, did not deal with the circumstance of a person returning to his Member State; and the Court's reasoning appears to be based exclusively on the Treaty provisions rather than on that directive. I consider this decision to be of particular significance to the analysis of Article 21 TFEU. (60)

83. Since Directive 2004/38 does not apply, the position of O, B, S and G and their sponsors must be considered under the Treaties. If the result of that analysis is that derived rights for third country national family members are required in order to enable EU citizens to enjoy the effective exercise of their free movement rights under Article 21 TFEU, it will then be appropriate to apply in the home Member State the minimum treatment guaranteed by Directive 2004/38 in host Member States. (61)

Article 21 TFEU

Derived rights of residence in the home Member State

84. Under Article 21(1) TFEU (and subject to its implementing measures), Member States must allow EU citizens who are not their nationals to move to, and reside on, their territory with their spouses and possibly certain other family members who are not EU citizens.

85. In the present cases, the Netherlands in essence *refuses* to grant, as a matter of EU law, residence rights to third country national family members of *its own nationals* in circumstances where, as a matter of EU law, it is in principle *required* to give such rights to third country national family members of *EU citizens who are nationals of other Member States*.

86. Why a Member State would wish thus to treat its own nationals less favourably than other EU citizens (who, except for their nationality, might very well be in identical or similar circumstances) is curious. So is the fact that, by denying residence, that Member State might be at risk of de facto 'expelling' its own nationals, forcing them either to move to another Member State where EU law will guarantee that they can reside with their family members or perhaps to leave the European Union altogether. Such a measure sits oddly with the solidarity that is presumed to underlie the relationship between a Member State and its own nationals. It is also difficult to reconcile with the principle of sincere cooperation that, in my view, applies between Member States just as it does between Member States and the Union. (62)

87. Yet the written observations and the oral submissions in the present cases show that a considerable number of Member States consider that EU law does not preclude them from doing exactly that.

88. A simple reaction to this argument would be that, pursuant to Article 21(1) TFEU, Member States may not restrict the right of EU citizens to move and reside freely within the territory of the European Union. Or, as Advocate General Jacobs put it, 'subject to the limits set out in [that article] itself, no unjustified burden may be imposed'. (63)

89. That same principle applies to EU citizens seeking to exercise the right to freedom of movement who marry a third country national. Such a couple will often (perhaps, normally) wish to exercise their right to a family life in physical proximity to each other. If they are precluded from living together in the Member State of which the EU citizen is a national (to which he returns after presence in the territory of another Member State or from which he exercises rights of free movement), they either do not live together or are obliged to move elsewhere. They might move to a country outside the European Union which allows them lawfully to reside together; or they might move to another EU Member State and rely on Directive 2004/38. In the first case, an EU citizen is effectively stripped of his EU citizenship because that status has only limited importance outside the European Union. (64) In the second case, it might be said that such a measure results in more movement. However, whilst facilitating free movement may well be an objective of Article 21(1) TFEU, imposing free movement is not. Rather, EU citizens are guaranteed the right to move and reside *freely* within the European Union. If a measure is likely to affect the EU citizen's free choice to exercise that right, then it is a restriction which, unless justified, is contrary to Article 21(1) TFEU.

90. In my opinion, the same reasoning applies where other close family members are concerned (such as parents-in-law, as in the case of S), provided that it is established that the EU citizen will otherwise move elsewhere with his family (including such other family members) in order to live together with them, or will cease to exercise rights of free movement.

91. The Court has already applied this test where an EU citizen who has exercised rights of free movement and residence returns to reside in his home Member State (*Singh* and *Eind*), or has exercised rights of free movement while continuing to reside in his home Member State (*Carpenter*, (65) decided after *Singh* (66) but before *Eind* (67)). In essence, those first two decisions show (68) that, where an EU citizen has moved to *and* resided in another Member State, family members may then accompany him to, or join him in, his home Member State under conditions no less favourable than those applicable, under EU law, in the host Member State.

92. Mr Singh and Mr Eind had both, as migrant workers, moved to and then resided in a Member State other than that of their nationality. Each then returned to his own Member State. Mr Singh became self-employed; Mr Eind did not work. Each had a third country national family member who had lived with him in the host Member State and who sought to live with him in the home Member State.

93. The Court held that Mr Singh, upon returning to his home Member State, should be treated in a manner at least equivalent to that which he would have enjoyed in the host Member State from which he had moved. (69) A family member could thus accompany him to the home Member State under the conditions set out in the European Community legislation which was the precursor of Directive 2004/38. (70)

94. In *Singh*, the Court gave little express consideration to the right to respect for family life, though its reasoning was that if an EU citizen was prevented from exercising that right by living together with his spouse and children on returning to his own Member State, he might be discouraged from exercising the fundamental freedoms to enter and reside in the territory of another Member State (the so-called 'chilling effect'). (71) In *Eind*, the Court was more explicit in its acceptance that barriers to family reunification are liable to result in barriers to the right of free movement of EU citizens. (72) Unlike *Singh* (which was decided in 1992), *Eind* dates from 2007, after the introduction of EU citizenship.

95. Thus, an EU citizen acquires the right to be accompanied or joined by a defined group of family members when exercising rights of free movement and residence. Knowing that that right will be lost upon returning to the home Member State is likely either to discourage him from moving in the first place or place limitations on what he can do after making that first move. In that regard, it makes no difference that a family member did not, prior to the first move, enjoy a right of residence in the home Member State: Directive 2004/38 guarantees that EU citizens may reside, after the second move, with family members who lived with them prior to the first move, who join them from outside the European Union or who become family members after the first move. (73) For that reason, the home Member State cannot treat its own nationals returning to reside on its territory less favourably than the treatment they enjoyed as EU citizens in the host Member State. What matters is the treatment to which an EU citizen was *entitled* in the host Member State. What treatment an EU citizen actually *enjoyed* is of no importance. (74) Because, after the first move, the rights under EU law are 'passported' and remain with the EU citizen on his return to his home Member State, the conditions and limitations set out in Directive 2004/38 also indirectly apply to EU citizens returning to their home Member State.

Defining residence

96. If the EU citizen did not take up residence in another Member State, it is less evident that denying family members a right of residence under EU law in the home Member State will adversely affect the EU citizen's rights of free movement. But what does it mean to reside in another Member State? This question underlies the second and third questions in Case C-456/12.

97. Directive 2004/38 sets out the conditions under which an EU citizen may reside in another Member State without defining what 'residence' means. Nor do the Treaties contain a general definition. Certain secondary law instruments define 'residence' for the purpose of that particular legislation, referring to notions like 'normal residence' (75) or 'habitual residence'. (76)

98. Residence has different functions in EU law. In certain contexts, it might be used as a criterion for determining the applicable law (for example, in tax law and private international law) and to avoid so-called benefits tourism. (77) Elsewhere, it might be the substance of a right (78) or an element whose absence excludes access to a benefit. (79) In certain contexts, it is expressly defined. In others, it is not. Thus, residence is not a uniform concept in EU law.

99. In the context of EU citizenship law, residence in another Member State is, apart from being a right, sometimes a condition for exercising ancillary rights attached to that status (for example, the right to vote and to stand as a candidate in elections to the European Parliament and in municipal elections (80)), but it can also be a requirement that restricts other freedoms guaranteed under EU law.

100. In *Swaddling*, the Court held that the definition of residence in Article 1(h) of Regulation No 1408/71 (81) meant 'habitual residence' and suggested that it therefore had an EU-wide meaning. (82) The Court interpreted the phrase 'the Member State in which they reside' as being the place 'where the habitual centre of their interests is to be found', which should be determined taking into account 'the employed person's family situation; the reasons which have led him to move; the length and continuity of his residence; the fact (where it is the case) that he is in stable employment; and his intention as it appears from all the circumstances'. (83) In so saying, the Court has indicated that a proper understanding of whether a person is resident or not must be based, not on a single factor, but on a collection of elements that together enable the individual's situation to be assessed and categorised as residence or non-residence.

101. In other areas of EU law, the Court has articulated a similar understanding of residence: it is where a person has his habitual or usual centre of interests and it must be determined in light of the facts at issue, which include both objective and subjective elements. (84)

102. I do not think that residence requires constant physical presence in the territory of a single Member State (the third question asked in Case C-456/12). Otherwise, one could be found to be resident in a Member State only if one had not exercised the right to freedom of movement (by definition, prior to moving, one would have lived somewhere else). (85) It might reasonably, however, require a preponderance of presence.

103. Nor do I think that whether an EU citizen has taken up residence in another Member State turns on whether that is his sole place of residence. In many cases, exercise of the right to reside freely in the European Union will involve moving residence from one Member State to another, without keeping any meaningful connection with the former place of residence. In other cases, however, it will be expedient for various reasons to maintain significant ties.

104. Provided that EU citizens satisfy the test for establishing residence in a Member State, it should not matter that they might keep some form of residence elsewhere. (86) There is no general rule of EU law whereby residence in one Member State precludes concurrent residence in another Member State. (87) That appears to be implied also by the provisions of Directive 2004/38 which make residence of longer than three months dependent on the condition that an EU citizen either is a worker or a self-employed person or has sufficient

resources available in order to avoid becoming a burden on the social assistance system of the host Member State. By contrast, full solidarity (when the 'sufficient resources' condition no longer applies) must be shown to permanent residents. (88)

105. Whilst EU citizens who are not migrant workers or self-employed persons in the host Member State might need to show that they have sufficient resources, Directive 2004/38 is neutral as to the source(s) of those resources, which may thus originate from activities or interests elsewhere in or outside the European Union. If that were not so, there would be a blatant restriction of fundamental freedoms.

106. Does it matter whether an EU citizen initially moved to the host Member State to exercise an economic freedom and whether he returned to his home Member State in order to be economically active there?

107. I do not think so.

108. Mr Eind moved from the Netherlands to the United Kingdom to be economically active there; when he returned to the Netherlands, he did not work. His daughter nevertheless had the right to settle with him in the Netherlands, though subject to the conditions in Regulation No 1612/68 regarding residence of descendants of a migrant worker. (89) That was the treatment to which Mr Eind was entitled in the United Kingdom and, upon returning to the Netherlands, he could not lose it.

109. Thus, an EU citizen can claim in his home Member State treatment no less favourable than that to which he was entitled as a worker or self-employed person in the host Member State. No longer being economically active does not alter that entitlement. Nor does the fact that an EU citizen did not have worker or self-employed status in the host Member State, because the EU citizen's rights of free movement and residence are now no longer dependent on the exercise of an economic activity. However, the conditions under which his family members can reside in the host Member State may differ. (90)

110. I am not persuaded by the argument that an EU citizen (whether he is, or is not, a migrant worker or a self-employed person) must have resided in another Member State for a continuous period of at least three months or some other 'substantial' period of time before his third country national family members can derive rights of residence from EU law in the home Member State (the subject-matter of the second question in Case C-456/12). That argument presupposes that enforced separation from a family member, such as a spouse, will not deter an EU citizen who wishes to move to settle temporarily in another Member State from exercising his rights of free movement and residence. I see no basis for saying that, in such circumstances, the EU citizen should be required temporarily to sacrifice his right to a family life (or, put slightly differently, that he should be prepared to pay that price in order subsequently to be able to rely on EU law as against his own Member State of nationality). Indeed, under Directive 2004/38, family members are entitled to accompany the EU citizen immediately to the host Member State. Directive 2004/38 does not make their entitlement to that derived right conditional on a minimum residence requirement for the EU citizen. Rather, the conditions applicable to the dependents vary with length of residence in the territory.

111. The length of an EU citizen's stay in another Member State is (obviously) a relevant quantitative criterion. However, I consider that it cannot be applied as an absolute threshold for deciding who has, or has not, exercised rights of residence and can therefore be joined or accompanied (91) by their family members. It is one criterion amongst those which must be taken into account.

Free movement without residence

112. What if an EU citizen moves to a Member State other than that of his nationality but does not take up residence there? Are his third country national family members then entitled to join him in his Member State of nationality and residence? This is the essence of the first and second questions in Case C-457/12.

113. The reasoning in *Singh* (92) and *Eind* (93) does not cover this situation. However, *Carpenter* (94) already shows that derived rights of residence in the Member State of nationality and residence may be available to third country national family members of EU citizens who exercise single market freedoms (for example, to provide services) but do *not* move their place of residence to another Member State.

114. In *Carpenter*, the national court had found that the childcare and homemaking performed by Mrs Carpenter might indirectly assist and facilitate her spouse's right to provide services in another Member State. That meant that Mr Carpenter could spend more time on his business, a considerable part of which was conducted in other Member States. (95) The Court held that denying Mrs Carpenter residence and thus separating the two spouses would be 'detrimental to their family life and, therefore, to the conditions under which Mr Carpenter exercises a fundamental freedom'. (96) Applying the rationale of *Singh*, the Court found that full effectiveness of that freedom might be undermined if there were obstacles in Mr Carpenter's Member State of origin to the entry and residence of his spouse. (97)

115. In examining whether that restriction could be justified, the Court then considered that the decision to deport Mrs Carpenter constituted an interference with Mr Carpenter's exercise of his right to respect for his family life within the meaning of Article 8 of the European Convention on Human Rights. (98)

116. Let us look at the decision in *Carpenter* a little more closely.

117. The Court's reasoning is necessarily based on the premiss that there was a causal connection between Mr Carpenter's exercise of economic free movement and his Filipino wife's residence in Mr Carpenter's Member State of nationality and residence. The economic activity provided support for his third country national wife. Conversely, Mr Carpenter was dependent on his wife in so far as she looked after his children, did the homemaking and thereby indirectly contributed to his success. (99) The conditions under which the right to a family life was exercised were therefore liable to affect the exercise of rights of free movement. Denial of a right of residence for Mrs Carpenter in Mr Carpenter's Member State of nationality and residence was likely to oblige him either (i) to move to another Member State in order to enable his wife to join him there (subject to the conditions set out in Directive 2004/38) or (ii) to accept the limitation on his right to a family life and lose his wife's presence with him in his home Member State, which would affect the conditions under which he exercised his freedom to provide services in another Member State (without residing there). Whether it would in fact have caused him to cease his activities abroad is unclear and does not form part of the Court's reasoning.

118. What is the relevance of that analysis, first, to the active exercise of rights of movement without residence as a worker and second, to the 'passive' exercise of the right to receive services?

Moving across borders as a worker without moving residence

119. EU citizens who, without moving residence, exercise the right of free movement in connection with an activity which helps to support, or which makes them dependent on,

family members might for that reason need to be joined by certain family members in their home Member State. The connection between residence and the exercise of rights of free movement in such cases can be quite visible and easy to establish. For example, if the family members of a frontier worker are denied residence, the latter might be dissuaded from working in another Member State or forced to change his residence and move with his family to another Member State. The same applies to EU citizens who are dependent on a family member because the latter facilitates or enables their exercise of the right of free movement. This flows directly from what the Court has already held in *Carpenter* in relation to the 'active' provision of services to clients resident in another Member State.

120. Is there an essential difference between living in Member State A but working for an employer in Member State B (the position of sponsor G), and living in Member State A, working for an employer who is also resident in Member State A but doing work that requires the worker to go to another Member State (the position of sponsor S)? This issue stems from the substance of the two questions referred in Case C-457/12.

121. I do not think so. In both cases, the worker's employment requires him to cross borders in order to fulfil his contract of employment. He cannot both keep his job and stay put in his home Member State. The question then becomes, is a restriction on the presence of the third country national family member in the home Member State going either to prevent the worker from crossing the border to perform his contract of employment or make it appreciably more difficult for him to do so? The circumstances may be such that, on the facts, it makes no difference to the exercise of the right to free movement. If, however, the worker's ability to fulfil his contract would be appreciably impaired if he cannot draw on the support afforded by the third country national family member (or if, indeed, cross-border work would become impossible), the effective exercise of free movement rights by the EU citizen dictates that derived rights of residence in the home Member State must be granted under EU law to his third country national family member.

122. Whether the third country national family member can claim such a right in the EU citizen's home Member State depends on the same three variables that initially formed the basis for establishing derived rights for third country nationals under EU law. These are:

– the family connection with the EU citizen;

– the EU citizen's exercise of rights of free movement and

– the causal link between the residence of the third country national and the EU citizen's exercise of rights of free movement.

123. Assessment of those criteria does not automatically lead to a simple 'yes' or 'no' answer. The magnitude of any restriction on the right of free movement may vary considerably depending on, for example, the closeness of the family connection. At the same time, the relevance of that connection and dependency to the EU citizen's choice as to whether or not to exercise the right of free movement can similarly vary greatly. A restriction of that choice exists if it is shown that denying the third country national family member residence may plausibly cause the EU citizen to move, to cease to move or to abandon the real prospect of moving.

Enjoying the 'passive' freedom to receive services in another Member State without moving there

124. This is the focus of the first question in Case C-456/12.

125. Within the scope of application of EU law, every EU citizen is guaranteed the same level of protection of his fundamental freedoms and right to a family life. An EU citizen who moves to another Member State in order to enjoy a service there, whatever that service might be, falls within the scope of application of EU law. (100) However, it does not follow that every exercise of the right of free movement to receive services will necessarily generate derived rights of residence for third country national family members of the EU citizen in the home Member State. That is because not every denial of residence constitutes a barrier to family reunification such as to restrict an EU citizen's fundamental right to move. (101)

126. A society or economy without services has become unimaginable. (102) Increasingly, EU citizens cross borders to enjoy services. For many, that might be the only type of right of free movement that they will ever exercise: they go on holidays, make day trips, order books online, and so forth.

127. Yet not all of these forms of exercise by an EU citizen of the passive freedom of services are dependent on whether third country national family members are also resident in the Member State where that EU citizen resides.

128. Whilst moving to another Member State in order to enjoy a service is undoubtedly an exercise of an economic freedom, it is usually not the type of activity which enables EU citizens to support, or makes them dependent on, their family members (possibly because of the opportunity cost of exercising the right of free movement). For those reasons, barriers to family unification are less likely to affect the considerations that cause an EU citizen to move and/or reside elsewhere.

129. In most circumstances, derived rights of residence for family members (which might lead to permanent residence) are *not* necessary for an EU citizen to enjoy a service which is essentially temporary 'in the light, not only of the duration of the provision of the service but also of its regularity, periodicity or continuity', (103) and which is often a consumer service for which an EU citizen pays rather than a revenue-generating activity.

130. The fact that the service might be more pleasurable when enjoyed with a family member is of itself insufficient to establish a restriction on the right of free movement, because that consideration is not inherent in the reasons which prompt EU citizens to cross borders in order to enjoy a service (for example, a meal in a particularly nice restaurant) instead of remaining in their Member State of nationality and residence to do so.

131. However, I do not rule out the possibility that, exceptionally, derived rights of residence for the third country national family member may be necessary. That would, in particular, be the case where an EU citizen becomes dependent on a family member due to the very circumstances that cause him to cross borders in order to enjoy services in another Member State. For example, suppose a German national residing in Germany and married to a Chinese national who has not been authorised to reside there becomes ill and requires long-term treatment. He decides, for medical reasons, to receive that treatment in Belgium. He has no intention of changing his residence and settling there. He does however require assistance to travel regularly to Belgium. He also needs help to take care of other things that he can no longer do for himself. He becomes dependent on a carer. Understandably, he would like that carer to be his Chinese wife. That decision belongs to the sphere of his private and family life; but at the same time it is connected to the conditions in which he exercises rights of free movement.

Moving between Member States in order to enjoy the right to a family life

132. What if an EU citizen moves solely in order to exercise his right to a family life with a family member residing elsewhere in the European Union? Can he subsequently claim a restriction on the exercise of his freedom of movement if that family member is not allowed, as a matter of EU law, to take up lawful residence in his Member State of nationality and residence? Those questions are relevant to the position of B and O (Case C-456/12), both of whom appear to have crossed borders in order to be with their partner or spouse.

133. It might be argued that, if such a restrictive national measure results in an EU citizen taking up residence in another Member State, that is the very function of EU citizenship and illustrates how free movement rights can enhance the exercise of the right to a family life.

134. However, the issue is not whether such a national measure results in (or allows) free movement to take place. What matters is the *freedom to choose whether to move or not to move*. A measure that imposes movement restricts that choice. It is therefore contrary to Article 21(1) TFEU. (104)

What conditions govern the exercise of derived rights of residence

135. Whilst the referring court's questions focus on the existence of derived rights of residence, such rights are not unconditional. Their exercise can be governed by the Treaties or by implementing legislation.

136. Article 21(1) TFEU states that the right of EU citizens to move and reside freely within the territory of the Member States is 'subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect'.

137. An EU citizen who moves to a Member State other than that of his nationality has the right to enter its territory and reside there under the conditions set out in Directive 2004/38. For residence of up to three months, for example, he needs only to hold a valid identity card or passport. (105) The same applies to third country national family members accompanying or joining him there. (106) Other conditions apply for residence longer than three months and permanent residence. When the EU citizen then returns to his home Member State, he should enjoy the right to be accompanied or joined there by his third country national family members under conditions no less favourable than those applicable, as a matter of EU law, in the host Member State.

138. Suppose an EU citizen resided for two months in the host Member State and was joined there by his third country national spouse. Circumstances (perhaps, a parent's serious illness) cause him to return to his home Member State where he intends to reside with his spouse for the foreseeable future. He can do so provided that his spouse satisfies the relevant conditions in Directive 2004/38. The fact that she only lived with him for two months in the host Member State does not imply that the duration of her residence in the EU citizen's home Member State must be limited in the same manner. If it were, the EU citizen might be forced either to refrain from moving back to his own Member State in order to continue to reside elsewhere in the European Union with his spouse, or to leave her behind when returning to his Member State because she could derive rights of residence only for two months and he needs to stay home for longer. Had they stayed in the host Member State, and provided that the relevant conditions were satisfied, his wife would have been able to stay for more than three months and possibly obtain permanent residence there.

139. Finally, does the derived right of residence expire if there is some (undefined) gap between the return of the EU citizen to his home Member State and the family member's arrival there? This is the issue raised by the fourth question in Case C-456/12 (concerning B).

140. The answer depends, in my view, on why the EU citizen and his family member(s) were not moving together.

141. Under Directive 2004/38, the host Member State cannot deny residence to a third country national on the basis of elapsed time. Their right is to 'accompany or join' the EU citizen with whom they share relevant family links. (107) That wording means that a lapse of time after the EU citizen has entered and taken up residence cannot preclude a third country national from 'joining' him later. Indeed, the Court has held that Directive 2004/38 does not require family members of EU citizens to enter the host Member State at the same time as the EU citizen from whose status they derive rights. (108)

142. I do not consider that the reason for the delay is relevant. What matters is that the decision to move in order to reside with an EU citizen is taken in the exercise of the right to a family life. EU citizens enjoy the freedom to decide themselves how to exercise the right to a family life (if they did not, the right would be of little worth). Many will prefer to live with their family members; others might, at a particular moment, have other priorities (which might also change over time) or there might be practical obstacles to them living together immediately. By contrast, if a third country national family member and an EU citizen have decided that they no longer wished to live together as a couple and exercise their right to a family life, there would be no derived right of residence for the third country national.

143. Against this background, I turn now to consider briefly how the referring court should analyse the situations of O, B, S and G.

What determines the derived rights of residence of O, B, S and G

– O

144. Sponsor O moved from the Netherlands, married O in France and then moved with her husband to Spain. If O lawfully resided in Spain with sponsor O as a third country national family member of an EU citizen under Directive 2004/38, then sponsor O should not, when she returns to work and live in the Netherlands, be treated less favourably than when she moved to Spain to take up residence there. It follows, if those facts are confirmed (which is of course a matter for the national court), that O would have under EU law a right to lawful residence in the Netherlands. That right is neither unconditional nor absolute. It is subject to the conditions and limitations set out in Directive 2004/38 in the same way as his earlier right to residence in Spain.

– B

145. Sponsor B exercised rights of free movement and possibly took up residence in Belgium in order to live there with (at that time) her partner B. (Whether or not sponsor B was a job-seeker in Belgium is unclear and is a matter to be verified by the national court.) As a mere partner, however, B did not fall within the scope of Article 3(2) of Directive 2004/38 and could not, therefore, derive a right of residence in Belgium from EU law by virtue of sponsor B's presence there. Whether or not sponsor B took up residence in Belgium is therefore not decisive for B's claim to residence in the Netherlands.

146. Nor is it relevant for the purposes of Article 21(1) TFEU that sponsor B lived with or visited B in Morocco after they were married, because that provision guarantees only rights of free movement and residence in the European Union.

147. Nor does there appear to be a connection between denial of residence in the Netherlands to B and the exercise by sponsor B of rights guaranteed under Article 21(1)

TFEU. Any form of exercise of such rights was completed at a point in time when there was not yet a family connection between B and sponsor B.

148. However, the mere lapse of a period of time between sponsor B's return to the Netherlands and B's arrival would not affect any claim that the latter had to a derived right of residence, provided that the decision to join sponsor B in the Netherlands was taken in the exercise of their right to a family life. (109)

– S

149. Sponsor S is not a 'national of a Member State who, irrespective of his place of residence and of his nationality, has exercised the right to freedom of movement for workers and has been employed in a Member State other than that of his residence'. (110) He is employed in his Member State of residence and nationality and, when moving to Belgium and other Member States, he does not enter the labour market there. (111) He is not a posted worker (112) nor does he cross borders in order to provide services in Belgium within the meaning of Article 56 TFEU. Instead, it is presumably his employer who provides services in other Member States through sponsor S's intervention.

150. However, the fact remains that sponsor S exercises his right of free movement in connection with an economic activity (his employment in the Netherlands), the results of which (subject to verification by the national court) contribute to the welfare of his family. The opportunity cost of taking up this type of employment is his need to seek child care for his son. (It is for the national court to examine whether he would need to seek such care (and, if so, to the same extent) if he were simply working in the Netherlands.)

151. What about the two other variables, identified above, (113) namely family connection and causal link?

152. As regards the family connection between S and sponsor S, the referring court has held that S is a dependent family member in the ascending line within the meaning of Article 2(2)(d) of Directive 2004/38. That finding implies that the national court considers that sponsor S materially supports S (against the background of the Court's narrow conception of dependency under Directive 2004/38). In turn, sponsor S would appear to depend on S in so far as the latter cares for his son while he exercises rights of free movement in connection with his employment.

153. The rechtbank, which initially reviewed the Minister's decision, appears to have considered this fact not to be pertinent on the basis that either sponsor S's wife (also resident in the Netherlands) or professional child care services could look after his son.

154. On that basis, the referring court has taken the preliminary view that, if S were not allowed to reside in the Netherlands, sponsor S would not be in a worse position as regards the exercise of rights of free movement. In order to establish whether there is indeed no reasonable causal link between those two factors, the referring court will need to examine whether denying residence to S would cause sponsor S to seek alternative employment that would not involve the exercise of rights of free movement or cause him to move with his family, including S, to another Member State.

– G

155. Sponsor G is a frontier worker and continued to be so after his marriage in Peru to G, with whom he has children. As spouses, G and sponsor G must be presumed to be

dependent on each other in material, legal and emotional terms. Sponsor G's employment in another Member State would appear to be material to that family connection.

156. Denying G residence in the Netherlands might plausibly cause sponsor G, who wishes to live with G, to take up residence in Belgium (in order to reside together on the basis of Directive 2004/38) and thus to become a migrant worker resident in another Member State. That would be a restriction of his choice to be a frontier worker – an economic freedom that is, however, guaranteed under Article 45 TFEU.

157. Whether it would cause him to cease working abroad is less certain. Leaving aside the fact that such a decision would result in the loss of the means through which he supports his family, including G, it would not enhance the residence position of G in the Netherlands.

Postscript

158. Whether or not the Court agrees with the analysis that I have here set out, I would urge it to take the opportunity afforded by these two references to give clear and structured guidance as to the circumstances in which the third country national family member of an EU citizen who is residing in his home Member State but who *is* exercising his rights of free movement can claim a derived right of residence in the home Member State under EU law.

Conclusion

159. In the light of the foregoing considerations, I am of the opinion that the Court should answer the questions raised by the Raad van State to the following effect:

In Case C-456/12 *O*:

(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 does not apply directly to EU citizens returning to their Member State of nationality. However, the Member State of nationality may not give such EU citizens less favourable treatment than that owed to them as a matter of EU law in the Member State from which they moved to their Member State of nationality. As a result, Directive 2004/38 indirectly sets out the minimum standard of treatment that a returning EU citizen and his family members must enjoy in the EU citizen's Member State of nationality.

(2) EU law does not require an EU citizen to have resided for any minimum period of time in another Member State in order for his third country national family members to claim a derived right of residence in the Member State of nationality to which the EU citizen then returns.

(3) An EU citizen exercises his right of residence in another Member State if he makes that Member State the place where the habitual centre of his interests lies. Provided that, when all relevant facts are taken into account, that test is satisfied, it is irrelevant in this context whether that EU citizen keeps another form of residence elsewhere or whether his physical presence in the Member State of residence is regularly or irregularly interrupted.

(4) Where time elapses between the return of the EU citizen to the Member State of which he is a national and the arrival of the third country national family member in that Member State, the family member's entitlement to a derived right of residence in that

Member State does not lapse provided that the decision to join the EU citizen is taken in the exercise of their right to a family life.

In Case C-457/12 *S*:

Where an EU citizen residing in his Member State of nationality exercises rights of free movement in connection with his employment, the right of his third country national family members to reside in that State depends on the closeness of their family connection with the EU citizen and on the causal connection between the family's place of residence and the EU citizen's exercise of rights of free movement. In particular, the family member must enjoy a right of residence if denying that right would cause the EU citizen to seek alternative employment that would not involve the exercise of rights of free movement or would cause him to move to another Member State. It is irrelevant in that regard whether the EU citizen is a frontier worker or exercises his right of free movement in order to fulfil his contract of employment concluded with an employer based in his Member State of nationality and residence.

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1 – Original language: English.

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2 – Directive 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 (OJ 2004 L 158, p. 77, and corrigenda OJ 2004 L 229, p. 35, OJ 2005 L 30, p. 27, OJ 2005 L 197, p. 34, and OJ 2007 L 204, p. 28 – only the first cited correction is relevant to the provisions at issue in the present cases).

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3 – [1992] ECR I-4265.

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4 – [2007] ECR I-10719.

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5 – Of course, not all citizenship rights depend on whether an EU citizen has crossed borders. See, for example, Article 20(2)(d) TFEU. There are, furthermore, exceptional situations in which, even though no borders between Member States have been crossed, an EU citizen would be deprived of the 'genuine enjoyment of the substance of the rights conferred' by his EU citizenship in the absence of derived rights of residence for third country national family members: see the *Ruiz Zambrano*, *McCarthy* and *Dereci* line of case-law, discussed at points 52 to 66 below.

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6 – Case C-434/09 *McCarthy* [2011] ECR I-3375, paragraphs 29 and 34 and the case-law cited.

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7 – *McCarthy*, cited in footnote 6 above, paragraph 29 and the case-law cited.

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8 – See, for example, *Singh*, cited in footnote 3 above, paragraph 23, and *Eind*, cited in footnote 4 above, paragraph 32.

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9 – See, for example, Case C-109/01 *Akrich* [2003] ECR I-9607, paragraphs 55 and 56.

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10 – See, for example, recital 5 in the preamble to Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968(II), p. 475) and recital 6 in the preamble to Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union (OJ 2011 L 141, p. 1).

11 – See, for example, Case 59/85 *Reed* [1986] ECR 1283, paragraph 28 (where the Court made that point regarding the presence of an unmarried companion).

12 – See, for example, Case C-413/99 *Baumbast and R* [2002] ECR I-7091, paragraph 83.

13 – Case C-87/12 *Ymeraga and Others* [2013] ECR I-0000, paragraph 35; also Case C-86/12 *Alokpa and Others* [2013] ECR I-0000, paragraph 22.

14 – See, for example, recital 6 in the preamble to Directive 2004/38.

15 – Case C-1/05 *Jia* [2007] ECR I-1, paragraphs 35 and 37 and the case-law cited. See also, for example, Case C-83/11 *Rahman and Others* [2012] ECR I-0000, paragraphs 32, 33 and 35, and *Alokpa and Others*, cited in footnote 13 above, paragraph 25 and the case-law cited.

16 – See Joined Cases C-356/11 and C-357/11 *O and S* [2012] ECR I-0000, paragraph 56. In Case C-60/00 *Carpenter* [2002] ECR I-6279, the Court appeared to consider it relevant that Mr Carpenter depended on his wife in so far as she took care of his children. See further points 113 to 117 below.

17 – See, for example, Joined Cases C-64/96 and C-65/96 *Uecker and Jacquet* [1997] ECR I-3171, paragraph 16 and the case-law cited.

18 – Case C-40/11 *Iida* [2012] ECR I-0000, paragraph 77 and the case-law cited.

19 – This appears to be the cumulative effect of the judgments in Case C-34/09 *Ruiz Zambrano* [2011] ECR I-1177, paragraphs 43 and 44; *McCarthy*, cited in footnote 6 above, paragraphs 46 and 47 and the case-law cited and Case C-256/11 *Dereci* [2011] ECR I-11315, paragraph 66.

20 – *Iida*, cited in footnote 18 above, paragraph 76. In reaching that conclusion, the Court had noted that Mr Iida was not seeking a right of residence with his spouse and daughter in the host Member State (Austria) but in their home Member State (Germany), that the two EU citizens had not been discouraged from exercising their free movement rights and that Mr Iida himself had certain residence rights anyway under both national law and EU law (see paragraphs 73 to 75).

21 – *Ruiz Zambrano*, cited in footnote 19 above, paragraph 42 and the case-law cited. The Court thus accepted that Mr Ruiz Zambrano, a Colombian national, could reside in the Member State of nationality and residence of his minor children, who were EU citizens (but had never left the Member State in which they were born) and were dependent on him.

22 – *Ruiz Zambrano*, cited in footnote 19 above, paragraph 44. In that regard, no mention was made of fundamental rights. Nor was the rationale for the conclusion explained.

23 – *McCarthy*, cited in footnote 6 above. Whilst it is indeed clear that Mrs McCarthy could stay in the United Kingdom on her own by virtue of her nationality and that she was not being deprived of a right to move under EU law by denying her husband derived rights as a third country national family member, it is less clear whether the Court considered the detailed implications. Perhaps the short answer was simply 'EU law can't help: try the ECHR'.

24 – *Dereci*, cited in footnote 19 above, paragraph 66. Mr Dereci was a Turkish national whose wife and children were Austrian and had always resided in Austria, where he wished to live with them.

25 – *Dereci*, cited in footnote 19 above, paragraph 67. See also *Iida*, cited in footnote 18 above, paragraph 71.

26 – *Dereci*, cited in footnote 19 above, paragraph 68.

27 – *Dereci*, cited in footnote 19 above, paragraph 72.

28 – In *Iida* (cited in footnote 18 above, paragraph 80), the Court appears to have applied a slightly different test (namely, whether Mr Iida was entitled to a particular benefit under EU law (a residence card)) in order to decide whether the application of a national law implementing EU law could be brought within the scope of EU law.

29 – Article 51 of the Charter. See also Case C-617/10 *Åkerberg Fransson* [2013] ECR I-0000, paragraphs 20 and 21, as recently confirmed in Case C-418/11 *TEXDATA Software* [2013] ECR I-0000, paragraph 73.

30 – See, in that regard, my Opinion in Case C-390/12 *Pfleger*, pending before the Court, points 35 to 47, which draws on the material contained in the Explanations Relating to the Charter of Fundamental Rights (OJ 2007 C 303, p. 17). Under Article 52(7) of the Charter, the latter are to be 'given due regard' by the courts of the Union and of the Member States. In the context of EU citizenship, an example of a negative obligation would be where a Member State sought to invoke public policy reasons to exclude an EU citizen who was a national of another Member State from its territory. The Member State's freedom of action is here constrained by the requirements of EU law, which it may not breach. For a more wide-ranging discussion, see paragraphs 151 to 177 of my Opinion in *Ruiz Zambrano*, cited in footnote 19 above.

31 – See, for example, *Iida*, cited in footnote 18 above, paragraph 77 and the case-law cited.

32 – See, for example, *Carpenter*, cited in footnote 16 above, paragraph 40 and the case-law cited.

33 – Article 52(3) of the Charter states that: 'In so far as this Charter contains rights which correspond to rights guaranteed by the [ECHR], the meaning and scope of those rights shall be the same as those laid down by the [ECHR]'. However, Article 52(3) 'shall not prevent Union law providing more extensive protection'.

34 – *McCarthy*, cited in footnote 6 above, paragraph 28 and the case-law cited.

35 – *Eind*, cited in footnote 4 above, paragraph 43 and the case-law cited.

36 – Case C-127/08 *Metock and Others* [2008] ECR I-6241, paragraph 84 (citing *Eind*, cited in footnote 4 above, paragraph 43).

37 – Article 3(1) of Directive 2004/38.

38 – *Metock and Others*, cited in footnote 36 above, paragraphs 54, 58, 70 and 80. In *Metock and Others*, the Court reconsidered its position in *Akrich*, cited in footnote 9 above (see paragraph 58). The judgment in *Metock and Others* was subsequent to B's decision to move to Morocco but, in any event, B and sponsor B were not yet married at the time. See point 27 above.

39 – *Metock and Others*, cited in footnote 36 above, paragraph 49.

40 – *Dereci*, cited in footnote 19 above, paragraph 55, and, with respect to spouses, *McCarthy*, cited in footnote 6 above, paragraph 42 and the case-law cited.

41 – See also point 48 above.

42 – *Iida*, cited in footnote 18 above, paragraph 57. See also point 48 above.

43 – Emphasis added.

44 – It is also possible to be born in Member State A and never leave it but never have any nationality other than that of Member State B (see, for example, Catherine Zhu in Case C-200/02 *Zhu and Chen* [2004] ECR I-9925), but that is not a common situation.

45 – Compare with, for example, *Iida*, cited in footnote 18 above, paragraph 64.

46 – *Iida*, cited in footnote 18 above, paragraph 64 and the case-law cited. At paragraph 51 (and in the case-law cited there), the Court held that derived rights of entry *and* residence depend on whether an EU citizen 'has exercised the right of freedom of movement by *becoming established* in a Member State other than the Member State of which he is a national'.

47 – See Articles 7(1) and 16(1) of Directive 2004/38.

48 – See recitals 4 and 19 in the preamble to Directive 2004/38.

49 – I see no basis for concluding that, despite the wording of Article 3(1), the drafters intended to widen the scope of Directive 2004/38 by referring in other provisions to 'the host Member State' or 'another Member State'.

50 – See *McCarthy*, cited in footnote 6 above, paragraph 39, and *Dereci*, cited in footnote 19 above, paragraph 54.

51 – More specific circumstances might involve, for example, EU citizens who are dual nationals and move between their Member States of nationality.

52 – *Iida*, cited in footnote 18 above, paragraph 64 and the case-law cited.

53 – See point 95 below.

54 – *McCarthy*, cited in footnote 6 above, paragraph 34, also paragraph 37. See also points 28 and 29 of the Opinion of Advocate General Kokott.

55 – Opinion of Advocate General Trstenjak in *Iida*, cited in footnote 18 above, especially points 48 and 54.

56 – See, for example, point 47 of her Opinion in *Iida*, cited in footnote 18 above.

57 – Cited in footnote 3 above.

58 – 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 (OJ 1973 L 172, p. 14).

59 – See Article 38(2) of Directive 2004/38.

60 – See points 91 to 96 below.

61 – See points 91 to 97, and 110 and 111 below.

62 – Article 4(3) TEU according to which '[p]ursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties'.

63 – Case C-224/02 *Pusa* [2004] ECR I-5763, point 22 of the Opinion.

64 – Such extreme deprivation of a core citizenship right is covered by the *Dereci* reformulation of the *Ruiz Zambrano* principle (both cases are cited in footnote 19 above). For the sake of accuracy, I recall that certain provisions, such as Article 20(2)(c) TFEU (diplomatic protection in a third country) do confer rights on EU citizens that can be enjoyed outside the territory of the European Union.

65 – Cited in footnote 16 above.

66 – Cited in footnote 3 above.

67 – Cited in footnote 4 above.

68 – I consider *Carpenter*, cited in footnote 16 above, later, at point 113 et seq.

69 – *Singh*, cited in footnote 3 above, paragraphs 19 and 23.

70 – See *Singh*, cited in footnote 3 above, paragraph 21; see also *Eind*, cited in footnote 4 above, paragraph 39, and Case C-162/09 *Lassal* [2010] ECR I-9217, paragraph 59 and the case-law cited.

71 – *Singh*, cited in footnote 3 above, paragraph 20.

72 – *Eind*, cited in footnote 4 above, paragraphs 37 and 44 and case-law cited (which includes a reference to *Carpenter*, cited in footnote 16 above); see also *Iida*, cited in footnote 18 above, paragraph 70.

73 – See, for example, *Metock*, cited in footnote 36 above, paragraphs 88, 89 and 92 (with regard to founding of a family after exercising the right of free movement).

74 – This follows from the way in which the Court phrased paragraphs 19 and 23 of its judgment in *Singh*, cited in footnote 3 above. See also the passages from *Metock* cited in the preceding footnote.

75 – See, for example, Article 7 of Council Directive 83/182/EEC of 28 March 1983 on tax exemptions within the Community for certain means of transport temporarily imported into one Member State from another (OJ 1983 L 105, p. 59), as amended.

76 – See, for example, Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 166, p. 1), as repeatedly amended; Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (OJ 2008 L 177, p. 6); Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) (OJ 2007 L 199, p. 40) and Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (OJ 2009 L 335, p. 1).

77 – See, for example, Case C-589/10 *Wencel* [2013] ECR I-0000, paragraphs 48 to 51, regarding the possibility of having two habitual residences under Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (OJ, English Special Edition 1971(II), p. 416), repealed by Regulation (EC) No 883/2004.

78 – See, for example, Directive 2004/38.

79 – See, for example, Case 188/83 *Witte* v *Parliament* [1984] ECR 3465, paragraphs 8 to 11, regarding the award of an expatriation allowance.

80 – See Article 22 TFEU.

81 – Cited in footnote 77 above.

82 – Case C-90/97 *Swaddling* [1999] ECR I-1075, paragraph 28.

83 – *Swaddling*, cited in footnote 82 above, paragraph 29 and the case-law cited.

84 – See, for example, Case 76/76 *Di Paolo* [1977] ECR 315; Case C-102/91 *Knoch* [1992] ECR I-4341; see also Advocate General Saggio's Opinion in *Swaddling*, cited in footnote 82 above, point 17. See also, for example, Case C-297/89 *Ryborg* [1991] ECR I-1943, paragraphs 24 and 25, and Case C-262/99 *Louloudakis* [2001] ECR I-5547, paragraph 55.

85 – In order to avoid this logical conundrum, most legal residence tests specify a fixed (and hence necessarily arbitrary) 'qualifying' period of presence before residence is achieved. There is no objective difference, however, between presence the day before and presence the day after the magic figure is attained.

86 – See, for example, *Di Paolo*, cited in footnote 84 above, paragraphs 17 and 21.

87 – For example, Member States never consider that a person cannot be tax-resident in their territory simply because he is (also) tax-resident in another territory.

88 – See Article 16(1) of Directive 2004/38.

89 – *Eind*, cited in footnote 4 above, paragraphs 38 and 39. Regulation No 1612/68 was amended by Directive 2004/38. It has now been repealed by Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union (OJ 2011 L 141, p. 1).

90 – See points 135 to 142 below.

91 – Indeed, if the EU citizen had to reside continuously for x months before he was entitled to have his family with him, he could only be 'accompanied' by them by leaving the territory after satisfying the magic period and then re-entering bringing his family with him, which would scarcely facilitate the exercise of his free movement rights.

92 – Cited in footnote 3 above.

93 – Cited in footnote 4 above.

94 – Cited in footnote 16 above.

95 – *Carpenter*, cited in footnote 16 above, paragraphs 14 and 19.

96 – *Carpenter*, cited in footnote 16 above, paragraph 39.

97 – *Carpenter*, cited in footnote 16 above, paragraph 39.

98 – See *Carpenter*, cited in footnote 16 above, paragraph 41.

99 – The Immigration Adjudicator found as a fact that Mrs Carpenter indirectly contributed in this manner to her husband's business' increased success: *Carpenter*, cited in footnote 16 above, paragraph 18. Advocate General Stix-Hackl considered that that fact was not relevant to the right of residence under EU law (see points 103 to 105 of her Opinion). I read the Court's explicit reliance on that fact as indicating that it disagreed with the Advocate General on this point.

100 – See, in that regard, Case C-221/11 *Demirkan* [2013] ECR I-0000, paragraphs 35 and 36.

101 – See also, in that regard, point 5 of the Opinion of Advocate General Tesauro in *Singh*, cited in footnote 3 above.

102 – See also, for example, Opinion of Advocate General Cruz Villalón in *Demirkan*, cited in footnote 100 above, especially points 49 and 50.

103 – Case C-55/94 *Gebhard* [1995] ECR I-4165, paragraph 27.

104 – See also point 89 above. I recall that, on the facts, there is no suggestion of marriages of convenience, fraud or abuse of rights (see point 42 above).

105 – Article 6(1) of Directive 2004/38.

106 – Article 6(2) of Directive 2004/38. Of course, upon entering the territory of the Member State, such third country nationals also need to satisfy any relevant entry visa requirements. See Article 5(2) of Directive 2004/38.

107 – See, for example, Articles 6(2), 7(2) and 16(2) of Directive 2004/38. See also *Eind*, cited in footnote 4 above, paragraph 38.

108 – See, for example, *Metock*, cited in footnote 36 above, paragraph 90; the order in Case C-551/07 *Sahin* [2008] ECR I-10453, paragraph 28, and *O* and *S*, cited in footnote 16 above, paragraph 54.

109 – See points 141 to 142 above.

110 – Case C-379/11 *Caves Krier Frères* [2012] ECR I-0000, paragraph 25 and the case-law cited.

111 – See, in that regard, Case C-43/93 *Vander Elst* [1994] ECR I-3803, paragraph 21 and the case-law cited.

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112 – See Article 1(3) of Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (OJ 1997 L 18, p. 1).

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113 – At point 122 above.