Reports of Cases

OPINION OF ADVOCATE GENERAL
TRSTENJAK
delivered on 15 May 2012[1]

Case C-40/11

Yoshikazu Iida
v
Stadt Ulm

(Reference for a preliminary ruling from the Verwaltungsgerichtshof Baden-Württemberg (Germany))

(Article 6 TEU — Articles 20 TFEU and 21 TFEU — Articles 7, 24 and 51 of the Charter of Fundamental Rights of the European Union — Articles 2, 3, 7(2), 10 and 12 of Directive 2004/38/EC — Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms — A national of a Member State who is a minor and who has moved with her mother to another Member State — Right of a third-country national having custody rights to reside in his child's State of origin — Scope of the Charter of Fundamental Rights of the European Union — Implementation of European Union law)

I – Introduction

1. The present request for a preliminary ruling concerns the question whether and, if so, to what extent and under what conditions, third-country nationals enjoy a right of residence under European Union law by virtue of their family and personal relationship with Union citizens who are minors. The request is thus connected with the problem under consideration in the *Dereci*[2] and *Ruiz Zambrano*[3] judgments concerning the extent to which the rights of residence enjoyed by Union citizens extend to third-country nationals. In this respect, the present case displays a peculiarity in that the third-country national is not applying for a right of residence in the Member State in which his daughter, the Union citizen, is living.

1 — Original language of the Opinion: German.
Language of the case: German.

2 — Case C-256/11 *Dereci and Others* [2011] ECR I-11315.

3 — Case C-34/09 *Ruiz Zambrano* [2011] ECR I-1177.

II – Legal framework

A – *European Union law*

1. Charter of Fundamental Rights of the European Union

2. Article 7 of the Charter of Fundamental Rights of the European Union ('the Charter') – 'Respect for private and family life' – provides:

'Everyone has the right to respect for his or her private and family life, home and communications.'

3. Article 24 of the Charter – 'The rights of the child' – provides:

'1. Children shall have the right to such protection and care as is necessary for their well-being. …

...

3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.'

4. The first sentence of Article 51(1) of the Charter is worded as follows:

'The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law.'

2. Directive 2004/38/EC

5. Recital 5 in the preamble to Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC ('Directive 2004/38') [4] provides:

'The 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. ...'

6. Article 1 of Directive 2004/38 defines the subject-matter of that directive in the following terms:

'This Directive lays down:

(a) 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;

…'

4 — OJ 2004 L 158, p. 77 – corrigendum in OJ 2004 L 229, p. 35 – most recently amended 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).

7. According to the definitions of terms in Article 2 of Directive 2004/38, 'family member' means, inter alia, 'the dependent direct relatives in the ascending line and those of the spouse or partner' (Article 2(2)(d)). Under Article 2(3) of that directive, 'Host Member State' means 'the Member State to which a Union citizen moves in order to exercise his/her right of free movement and residence'.

8. Article 3 of Directive 2004/38 – 'Beneficiaries' – provides:

'1. This Directive shall 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.

2. Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons:

(a) any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen.'

9. Article 7(2) of Directive 2004/38 provides:

'The right of residence … shall extend to family members who are not nationals of a Member State, accompanying or joining the Union citizen in the host Member State'.

10. Article 10 of Directive 2004/38 – 'Issue of residence cards' – provides:

'1. The right of residence of family members of a Union citizen who are not nationals of a Member State shall be evidenced by the issuing of a document called "Residence card of a family member of a Union citizen" no later than six months from the date on which they submit the application. …

2. For the residence card to be issued, Member States shall require presentation of the following documents:

…

(c) the registration certificate or, in the absence of a registration system, any other proof of residence in the host Member State of the Union citizen whom they are accompanying or joining;

…'

11. Article 12 of Directive 2004/38 provides as follows with regard to 'Retention of the right of residence by family members in the event of death or departure of the Union citizen':

'…

3. The Union citizen's departure from the host Member State or his/her death shall not entail loss of the right of residence of his/her children or of the parent who has actual custody of the children, irrespective of nationality, if the children reside in the host Member State and are enrolled at an educational establishment, for the purpose of studying there, until the completion of their studies.'

B – *European Convention for the Protection of Human Rights and Fundamental Freedoms*

12. Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the ECHR') concerns the right to respect for private and family life and is worded as follows:

'1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

C – *National law*

1. Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet (Law on the residence, employment and integration of foreign nationals in the Federal territory)

13. Paragraph 7 of the German Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet ('the Aufenthaltsgesetz') [5] concerns residence permits and provides as follows:

'(1) The residence permit is a temporary residence certificate. It shall be issued for the purposes of residence mentioned in the following sections. In cases which are justified, a residence permit may also be issued for a purpose of residence which is not covered by this Law.'

14. Paragraph 18(2) of the Aufenthaltsgesetz provides:

'A foreign national may be issued with a residence certificate for the purpose of taking up employment ...'

2. Gesetz über die allgemeine Freizügigkeit von Unionsbürgern (Law on general freedom of movement of Union citizens)

15. Under Paragraph 2 of the German Gesetz über die allgemeine Freizügigkeit von Unionsbürgern ('the Freizügigkeitsgesetz/EU'), [6] Union citizens who enjoy the right to free movement are to have the right to enter and reside in Federal territory, subject to the provisions of that Law, but the members of their family in principle enjoy that right only 'where they accompany or join the Union citizen' (Paragraph 3(1) of the Freizügigkeitsgesetz/EU) or where a right of permanent residence accrues after five years of lawful residence (Paragraph 4a of the Freizügigkeitsgesetz/EU).

16. Paragraph 5 of the Freizügigkeitsgesetz/EU provides as follows under the heading 'Certificates of rights of residence under Community law, residence cards':

...

5 — In the version resulting from the Communication of 25 February 2008 (BGBl. I p. 162), which was amended by Article 2(25) of the Law of 22 December 2011 (BGBl. I, p. 3044).

6 — Freizügigkeitsgesetz/EU of 30 July 2004 (BGBl. I, p. 1950, 1986), which was amended by Article 14 of the Law of 20 December 2011 (BGBl. I, p. 2854).

(2) Family members who enjoy freedom of movement and who are not Union citizens shall be issued, automatically, within six months after they have provided the necessary information, with a residence card for a member of the family of a Union citizen, which is to be valid for five years. …'

III – Facts of the main proceedings

17. The applicant in the main proceedings is a Japanese national. He has been married to a German national since 1998. Their daughter was born in the USA in 2004 and holds German nationality in addition to Japanese and US nationality.

18. At the end of December 2005 the family moved from the United States to Ulm (Germany). On 9 January 2006 the applicant received a national residence permit as the foreign spouse of a German national.

19. Since February 2006 the applicant has been employed in Ulm on a full-time basis, with an unlimited employment contract and a gross monthly income of EUR 4 850.

20. After the applicant's wife had accepted a post in Vienna in the summer of 2007, she moved her principal place of residence there in March 2008 and took their daughter with her. The applicant remained in Ulm. The parents have joint custody of the daughter, who attends school in Vienna. The applicant visits his daughter regularly once a month to spend the weekend together and pays maintenance for her of EUR 300 a month. The daughter also spends most holidays with the applicant.

21. In June 2008 the wife notified the German office responsible for foreign nationals that she had been living apart from the applicant since 1 January 2008. Accordingly, the residence permit originally issued to the applicant in his capacity as the spouse of a German national was not extended pursuant to the German Aufenthaltsgesetz.

22. At present the applicant is lawfully resident in Germany since he was issued with a national residence permit linked to employment pursuant to Paragraph 18 of the German Aufenthaltsgesetz.

23. However, the applicant takes the view that he also has a right of residence in Germany under European Union law by virtue of the right of custody which he exercises in respect of his daughter living in Austria. He claims that this right entitles him to be issued with a 'residence card of a family member of a Union citizen' within the terms of Article 10 of Directive 2004/38.

24. On 30 May 2008, however, the applicant applied unsuccessfully for the issue of such a residence card. That application is now the subject of appeal proceedings before the referring court.

IV – Questions referred for a preliminary ruling

25. The foregoing is the background against which the Verwaltungsgerichtshof Baden-Württemberg (Higher Administrative Court, Baden-Württemberg) has referred the following questions to the Court:

'A. Articles 2, 3 and 7 of Directive 2004/38/EC

1. Does "family member" include, in particular in the light of Articles 7 and 24 of the Charter of Fundamental Rights ("the Charter") and Article 8 of the ECHR on a broad interpretation of Article 2(2)(d) of Directive 2004/38, a parent who is a third-country national and has custody of a non-dependent child who is a Union citizen enjoying freedom of movement?

2. If so, does Directive 2004/38 apply to that parent, in particular in the light of Articles 7 and 24 of the Charter and Article 8 of the ECHR on a broad interpretation of Article 3(1) of the directive, even if he does not "accompany" or "join" the child who is a Union citizen and who has moved away from the Member State of origin?

3. If so, does that parent, in particular in the light of Articles 7 and 24 of the Charter and Article 8 of the ECHR, have a right of residence for more than three months in the Member State of origin of the child who is a Union citizen, on a broad interpretation of Article 7(2) of Directive 2004/38, at least where a right of custody exists and is actually exercised?

B. Article 6(1) EU in conjunction with the Charter

1.(a) Is the Charter applicable pursuant to the second alternative of the first sentence of Article 51(1) of the Charter if the subject-matter of the dispute depends on a national law (or part of a law) which partly – but not only – transposed directives?

1.(b) If not, is the Charter applicable pursuant to the second alternative of the first sentence of Article 51(1) of the Charter because the applicant could enjoy a right of residence under Union law and could accordingly claim, under the first sentence of Paragraph 5(2) of the Freizügigkeitsgesetz/EU (Law on the Freedom of Movement of Union Citizens), a residence card of a family member of a Union citizen which has its legal basis in the first sentence of Article 10(1) of Directive 2004/38?

1.(c) If not, is the Charter applicable pursuant to the second alternative of the first sentence of Article 51(1) of the Charter, in accordance with the *ERT* case-law (Case C-260/89, paragraphs 41-45), where a Member State restricts the right of residence of the father who is a third-country national and has custody of a Union citizen who is a minor and resides predominantly in another EU Member State with her mother on account of the latter's occupation?

2.(a) If the Charter does apply, does Article 24(3) of the Charter directly accord a right of residence under European Union law to the father who is a third-country national, at least if he holds and actually exercises the right of custody of his child who is a Union citizen, even though the child resides predominantly in another EU Member State?

2.(b) If not, does it follow from the freedom of movement of the child who is a Union citizen that under Article 45(1) of the Charter, possibly in conjunction with Article 24(3) of the Charter, the father who is a third-country national has a right of residence under European Union law, at least if he holds and actually exercises the right of custody of his child who is a Union citizen, so that in particular the freedom of movement of the child who is a Union citizen is not deprived of its practical effect?

C. Article 6(3) EU in conjunction with the general principles of Union law

1. Can the "unwritten' EU fundamental rights developed in the Court's case-law from the Stuttgart *Stauder* case (Case 29/69, paragraph 7) to, for example, *Mangold* (Case C-144/04, paragraph 75) be fully applied even if the Charter is not applicable in the specific case? In other words, do the fundamental rights which continue to apply as general principles of Union law under Article 6(3) EU stand autonomously and independently alongside the new fundamental rights laid down in the Charter in accordance with Article 6(1) EU?

2. If so, can a right of residence under European Union law be inferred, with a view to the effective exercise of the right of custody, from the general principles of Union law, in particular in the light of the right to respect for family life under Article 8 of the ECHR, for a father, who is a third-country national, of a Union citizen who is a minor and resides predominantly in another EU Member State with her mother on account of the latter's occupation?

D. Article 21(1) TFEU in conjunction with Article 8 of the ECHR

If Article 6(1) or (3) EU does not accord the applicant a right of residence under European Union law, in accordance with the ruling in *Zhu and Chen* (Case C-200/02, paragraphs 45-47) can a right of residence under European Union law be inferred, under Article 21(1) TFEU, possibly in the light of Article 8 of the ECHR, with a view to the effective exercise of the right of custody, from the freedom of movement enjoyed by a Union citizen who is a minor and resides predominantly in another EU Member State with her mother on account of the latter's occupation, for the father, who is a third-country national, in the Member State of origin of the child?

E. Article 10 of Directive 2004/38:

If a right of residence under European Union law is taken to exist, is a parent who is a third-country national in the applicant's situation entitled to the issue of a "residence card of a family member of a Union citizen", if necessary in accordance with the first sentence of Article 10(1) of the directive?'

26. However, the referring court concedes that '[o]f course, all the questions referred can also be summarised in a single question:

Under European Union law does a parent who has a right of custody and is a third-country national, in order to maintain a personal relationship and direct parental contact on a regular basis, have a right to remain in the Member State of origin of his child, who is a Union citizen, to be documented by a "residence card of a family member of a Union citizen", if the child moves from there to another Member State, exercising his right of free movement?'[7]

V – Assessment of the questions referred

A – *Order in which the questions are to be examined*

27. The summary question reproduced above in point 26, which is to be assessed in the light of the legal issues raised in point 25, in so far as they are relevant, must be taken as the basis for the following analysis.

28. Firstly, the referring court thus seeks to ascertain whether, in the circumstances of the case in the main proceedings, the applicant has a right of residence under Union law in the Member State of origin of his German child. Secondly, it asks whether the applicant is entitled, by virtue of that right, to the issue of a 'residence card of a family member of a Union citizen'.

B – *Right of a third-country national who has custody rights to reside in the Member State of origin of a Union citizen who is a minor and who has moved to another Member State*

29. It may be possible to derive a European-Union-law right of the applicant to reside in Germany from Directive 2004/38 or from primary law.

7 — Page 14 of the English translation of the order for reference.

30. In what follows, it is first necessary to examine whether such a right of residence can be established on the basis of Directive 2004/38.

1. Directive 2004/38

31. In determining whether a right of residence can be established on the basis of Directive 2004/38, it is necessary first to consider the wording of that directive's provisions, its scheme and its spirit and purpose. It will then be necessary to determine whether the outcome of this interpretation of Directive 2004/38 is compatible with fundamental rights by reference to its wording, scheme and objective.

a) Textual interpretation of Directive 2004/38

32. The applicant may have a right to reside in Germany under Article 7(2) or Article 12(3) of Directive 2004/38. Account must also be taken of recital 5 in the preamble thereto.

i) Article 7(2) of Directive 2004/38, in conjunction with Article 2(2)(d) thereof

33. Where a Union citizen moves to another Member State of which he is not a national, Article 7(2) of Directive 2004/38, in conjunction with Article 2(2)(d) thereof, confers on the parents of the Union citizen there a right of residence for more than three months where the Union citizen is dependent on them. However, this right of residence applies subject to the caveat that the family members concerned actually accompany or join the Union citizen.

34. The above requirements are not satisfied in the main proceedings here. Firstly, the father, who is a third-country national, is precisely not claiming a right of residence in respect of the host Member State to which his daughter has moved, namely Austria, but rather in respect of his daughter's Member State of origin, that is to say, Germany. Secondly, Article 7(2) of Directive 2004/38 is not relevant in terms of its wording precisely because the Japanese father did not join his daughter in the host Member State or accompany her there. Finally, the requirement laid down in Article 2(2)(d) of Directive 2004/38 is likewise not satisfied because in the present case the father is not dependent on the Union citizen, but rather the Union citizen is dependent on the father. [8]

ii) Article 12(3) of Directive 2004/38

35. Although Article 12(3) of Directive 2004/38 confers on the 'parent who has actual custody', irrespective of his nationality, a right of residence until the child completes his studies, this provision is, in view of its unambiguous wording, applicable only in the case where the Union citizen moves away *from his host Member State* and not, as in the case at issue here, where he moves away *from his Member State of origin*. Therefore, this provision likewise cannot establish a right of residence in Germany for the Japanese father of the German national who has moved to Austria.

iii) Recital 5 in the preamble to Directive 2004/38

36. At first glance, the wording of recital 5 in the preamble to Directive 2004/38 is broad and appears, if viewed in isolation, to grant third-country nationals a Union-wide right of residence 'within the territory of the Member States'.

8 — See also, as regards the comparable rule contained in Article 1(2)(b) of Directive 90/364/EEC, Case C-200/02 *Zhu and Chen* [2004] ECR I-9925, paragraph 44.

37. However, as it is a recital, this statement is to be assessed only as a principle to be taken into account in interpreting Directive 2004/38. It cannot undermine the exhaustive list and specific conditions governing the rights of residence afforded by the directive and replace them with an unconditional Union-wide right of residence for family members.[9] Otherwise, no independent scope would remain, for example, for Articles 7(2) and 12(3) of Directive 2004/38.

38. Consequently, no right of residence for a third-country national in the Member State of origin of his child can be derived from recital 5 in the preamble either.

iv) Interim conclusion

39. Consequently, no right of the applicant to reside in Germany can be derived from a textual interpretation of Directive 2004/38. The Court has consistently held that, in interpreting a provision of European Union law, it is necessary to consider not only its wording but also the context in which it occurs and the objectives pursued by the rules of which it is part.[10]

40. Since no right of residence for the third-country national who has custody rights in the Member State of origin of the Union citizen who is a minor can be derived from the wording of Directive 2004/38, it is therefore necessary to determine whether the directive in question lends itself to a 'broad interpretation'[11] beyond its wording by reference to its scheme and purpose.

b) Interpretation of Directive 2004/38 by reference to its scheme

41. As regards the question whether schematic considerations militate in favour of using Directive 2004/38, beyond its wording, to establish a right of residence for a third-country national who has custody rights in the Member State of origin of his child who has moved to another Member State, the Commission rightly states[12] that the scheme of Directive 2004/38 leaves no scope for extending the right of residence to situations in which the members of the family of a Union citizen who are third-country nationals wish to remain in the Member State of origin of the Union citizen after the latter himself has moved to another Member State.

42. The right of residence which Directive 2004/38 confers on family members who are third-country nationals is linked, in Article 7(2) thereof, to the fact that the family member has accompanied the Union citizen to the host Member State or joined him there.

43. Admittedly, the Court has pointed out that the requirement relating to 'family members [of Union citizens] who accompany … them' must not, in the interest of the practical effectiveness of Directive 2004/38, be interpreted narrowly, and it is not relevant, for example, whether the individuals concerned entered the host Member State at the same time.[13]

9 — See, in this regard, Riesenhuber, K., 'Die Auslegung' in Riesenhuber, K., *Europäische Methodenlehre*, 2nd edition, Walter de Gruyter, Berlin/New York 2010, § 11 paragraph 37: '*Rechte müssen stets aus dem normativen Teil eines Rechtsakts abgeleitet werden*' [Rights must always be derived from the normative terms of a legal act].

10 — See, inter alia, Case C-301/98 *KVS International* [2000] ECR I-3583, paragraph 21; Case C-300/05 *ZVK* [2006] ECR I-11169, paragraph 15; and Case C-19/08 *Petrosian and Others* [2009] ECR I-495, paragraph 34. As regards the methodical peculiarities in interpreting Union law, see Wendehorst, C., 'Methodenlehre und Privatrecht in Europa' in Jabloner, C. et al., *Vom praktischen Wert der Methode, Festschrift für Heinz Mayer zum 65. Geburtstag*, Manzsche Verlags- und Universitätsbuchhandlung, Wien 2011, p. 827 et seq.; as regards the specific risks of multilingualism in European Union law, see Müller, F./Christensen, R., *Juristische Methodik, Band II, Europarecht*, 2nd edition., Duncker & Humblot, Berlin 2007, paragraphs 324 to 344.

11 — See page 14 of the English translation of the order for reference.

12 — See paragraph 45 of its written observations. Detailed considerations on the possible relevance of Directive 2004/38 following a subsequent return of the Union citizen to his Member State of origin are not necessary in the present case in the absence of actual indications to that effect. See, with regard to a similar issue, Case C-291/05 *Eind* [2007] ECR I-10719.

13 — Case C-127/08 *Metock and Others* [2008] ECR I-6241, paragraph 93, and order in Case C-551/07 *Sahin* [2008] ECR I-10453, paragraph 28.

44. However, as Article 3(1) thereof makes clear, Directive 2004/38 relates, in line with the regulatory approach adopted therein, in principle only to situations concerning rights of residence of the Union citizen and the members of his family in Member States other than that of which the Union citizen is a national. [14]

45. Therefore, the right of family members who are third-country nationals to reside *in the Member State of origin of the Union citizen* does not in principle form the subject-matter of Directive 2004/38, and particularly not in the case where it is the Union citizen, and not the member of his family, who moves away from his Member State of origin to a host Member State.

46. The European Union legislature did not overlook the issue of a Union citizen possibly moving away in Directive 2004/38 but, rather, laid down detailed rules thereon in Article 12 thereof. Article 12(3) of Directive 2004/38 confers a right of residence on the family member who is a third-country national, but only in the host Member State and not in the Union citizen's Member State of origin. This provision is specifically relevant in the case where, for example, a Union citizen having custody rights, who initially moved with his spouse, who is the third-country national, and their children to the host Member State, moves again from that host Member State and the other parent, who is a third-country national, wishes to remain with the children in that State until they have completed their studies. By contrast, Article 12 of Directive 2004/38 contains no rules on the situation where there is a move away from the Member State of origin and on the continued existence of a right of residence there for the person who is a third-country national, and there is no apparent reason why the assessment of Article 12(3) of Directive 2004/38 should apply, beyond the subject-matter of the directive in question, *mutatis mutandis* to the Member State of origin. Moreover, even if Article 12(3) of Directive 2004/38 were to apply *mutatis mutandis*, no right of residence for the father could consequently be inferred in the present case because the father, who is a third-country national, and his child no longer reside in the same Member State, the situation which, however, Article 12(3) of Directive 2004/38 clearly takes as a basis.

47. What the general schemes of Articles 7(2) and 12(3) of Directive 2004/38 ultimately have in common is that the right of residence of the third-country national depends on the right of residence of the Union citizen in so far as he must have initially accompanied the Union citizen to a host Member State, and thus to a State other than the Union citizen's Member State of origin. This did not happen in the main proceedings here, as the Union citizen moved to Austria with only her mother.

48. In view of the scheme of Directive 2004/38, this fact cannot therefore be used to establish a right of residence for a third-country national who has custody rights in the host Member State of the Union citizen who is a minor and who has moved to another Member State.

49. The question further arises as to whether Directive 2004/38 can, beyond its general scheme, be used, on the basis of teleological reasoning, to establish a right of residence, for a third-country national who has custody rights, in the Member State of origin of the Union citizen who is a minor and who has moved to another Member State.

14 — As regards the term 'beneficiary' within the meaning of Directive 2004/38, see points 25 to 45 of the Opinion of Advocate General Kokott in Case C-434/09 *McCarthy* [2011] ECR I-3375.

c) Teleological interpretation of Directive 2004/38

50. As stated above, the purpose of Directive 2004/38 is to regulate cases concerning rights of residence of the Union citizen and members of his family in Member States other than that of which the Union citizen is a national. According to its spirit and purpose, it cannot therefore be required to cover situations such as that at issue in the main proceedings in the present case, which concern solely the Member State of origin of the Union citizen who has moved away and a right of residence for a family member which might exist in that Member State of origin.

51. The referring court, however, has also raised the question whether a 'broad interpretation' of Directive 2004/38 might be possible in the light of Articles 7 and 24 of the Charter of Fundamental Rights,[15] under which family life must be respected and children must have the right to protection and care and to regular personal contact with their parents.

d) Interpretation of Directive 2004/38 in a manner consistent with fundamental rights

52. Further legal development of the provisions of Directive 2004/38 may be required by way of an interpretation consistent with fundamental rights.

53. Under Article 6 TEU, the Charter of Fundamental Rights forms part of primary law. Secondary Union law, such as Directive 2004/38, must, so far as possible, be interpreted in a manner consistent with primary law, and thus with fundamental rights. Where an act is open to more than one interpretation, it is necessary to take as a basis the interpretation which is not in conflict with the fundamental rights protected by the European Union's legal order.[16]

54. Under Article 51 thereof, the Charter of Fundamental Rights must be complied with in the implementation of Directive 2004/38. However, the question as to interpretation and application of a legal act in a manner consistent with fundamental rights cannot be raised outside the scope of that legal act. Since it has been established above that Directive 2004/38 does 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, there is consequently also no need to examine the issue of assessment of the provisions of that directive in the light of the Charter of Fundamental Rights.[17]

55. The same is true of the provisions of the ECHR,[18] which, for purposes of interpretation, could, like the Charter of Fundamental Rights, be relevant solely in relation to the scope of Directive 2004/38. Since the directive at issue governs only rights of residence in Member States other than that of which the Union citizen is a national, there is also no need to examine this aspect in greater detail.

56. However, in the present context the question also arises as to whether fundamental rights can be applied directly on other grounds and confer on the applicant a right of residence in the Member State of origin of his daughter, thus bypassing Directive 2004/38. I will examine this later at point 75 et seq. of this Opinion.

15 — While the referring court considers such a 'broad interpretation', it rules that it is somewhat 'abstruse' (see page 14 of the English translation of the order for reference).

16 — See, for example, Case C-305/05 *Ordre des barreaux francophones und germanophones and Others* [2007] ECR I-5305, paragraph 28 and the case-law cited therein, and Joined Cases C-402/07 and C-432/07 *Sturgeon and Others* [2009] ECR I-10923, paragraph 48; with regard to the precedence of fundamental rights and of an interpretation which is consistent with fundamental rights, see Jarass, H. D., *EU-Grundrechte*, C.H. Beck, Munich 2005, § 3, paragraph 7.

17 — At point 31 of her Opinion in Case C-434/09 *McCarthy*, Advocate General Kokott points out that Directive 2004/38 is consistent per se with primary law, as is indicated, moreover, by recital 31 in the preamble to that directive, particularly with regard to fundamental rights.

18 — As regards its relationship to the Charter of Fundamental Rights, see my Opinion of 22 September 2011 in Joined Cases C-411/10 and C-493/10 *N. S. and Others* [2011] ECR I-13905, points 142 to 148.

57. However, a legal development of Directive 2004/38, on the basis of fundamental rights, to establish a right of residence for a third-country national, who has custody rights, in the Member State of origin of the Union citizen who is a minor and who has moved to another Member State is not necessary.

e) Interim conclusion

58. By way of interim conclusion, it must be stated that no right of residence for a third-country national who has custody rights, in the Member State of origin of a Union citizen who is a minor and has moved to another Member State, can be derived from Directive 2004/38.

59. Since secondary law does not grant the applicant the right of residence under Union law which he seeks, it is necessary, in what follows, to examine primary law.

2. Primary law

60. In the light of the fundamental rights guaranteed under Article 6(1) and (3) TEU, the applicant may have a right of residence in the Member State of origin of his child who has moved to Austria, pursuant to Articles 20 TFEU and 21 TFEU.

a) Right of residence of the third-country national who has custody rights in order effectively to guarantee the substance of the legal position, conferred by Union citizenship, of the Union citizen who is a minor

61. As a third-country national, the father who has custody rights cannot, in the present case, rely directly on the freedom of movement or right to remain enshrined in Articles 20 TFEU and 21 TFEU or on a right to remain based on Union citizenship. However, according to the case-law of the Court, the Union-citizen status of the Union citizen can, in individual cases, result in a right of residence under Union law also being conferred on a family member who is a third-country national.

i) Previous case-law of the Court [19]

62. According to the Court's case-law, in order for a parent who is a third-country national to have a right of residence under Union law which is derived from primary law, effective exercise of the Union citizen's legal position would have to be harmed substantially [20] if the parent who is a third-country national were denied a right of residence. Accordingly, a parent who is a third-country national was found to have a right of residence – in the same Member State, it should be noted, as that in which the minor was residing – for example where 'a refusal would lead to a situation where … children … would have to leave the territory of the Union', [21] or where otherwise 'the child's right of residence [would be deprived] of any useful effect'. [22]

19 — See for example, in addition to *Dereci and Others* (footnote 2), *Ruiz Zambrano* (footnote 3) and *Zhu and Chen* (footnote 8), Case C-60/00 *Carpenter* [2002] ECR I-6279, paragraph 46, on the freedom to provide services 'in the light of the fundamental right to respect for family life', and Case C-434/09 *McCarthy* [2011] ECR I-3375, paragraph 57.

20 — See, for example, *Ruiz Zambrano* (footnote 3), paragraph 42, according to which national measures '[may not deprive] citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union'.

21 — *Ruiz Zambrano* (footnote 3), paragraph 44.

22 — *Zhu and Chen* (footnote 8), paragraph 45.

63. With reference to the criterion relating to the 'substance of the rights conferred by virtue of the status of citizen of the Union' the Court recently stated again in its judgment in *Dereci*[23] that a derived right of residence for a third-country national can in principle be found to exist only exceptionally and in that respect stated 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 the members of his family who do not have the nationality of a Member State to be able to reside with him in the territory of the Union, is not sufficient in itself to support the view that the Union citizen will be forced to leave Union territory if such a right is not granted.' At the same time, however, the Court specifically acknowledged that that finding is 'without prejudice to the question whether, on the basis of other criteria, inter alia, by virtue of the right to the protection of family life, a right of residence cannot be refused. However, that question must be tackled in the framework of the provisions on the protection of fundamental rights which are applicable in each case'.

ii) Application of the principles developed in case-law to the facts of the main proceedings

64. It can scarcely be argued from the outset that in the present case the core of the legal position conferred by Union citizenship of the Union citizen who is a minor would be affected if her father, who is a third-country national, were not granted a right of residence in Germany under Union law.

65. Arguing against this is the fact that the Union citizen has already in fact moved with her mother to Austria, although her father has still not been granted a right under Union law to reside in Germany, and has consequently exercised her freedom of movement in full. Therefore, since the essence of the practical effect of the Union citizen's legal position under Union law is clearly not under threat in this specific case, it must for the moment be held, in accordance with the principles developed in the case-law, that the Union citizen's father does not have a derived right of residence under Union law on the basis of his daughter's Union citizenship or the freedom of movement.

66. However, it should be borne in mind that the father, who is a third-country national and who has custody rights, may exercise the right to determine the place of residence jointly with the child's mother and consequently decide (with her) where his child is to reside. It is conceivable that the mother and he might, if he were to be threatened with not having his residence permit in Germany extended or denied a right of residence under Union law, consider moving the child's place of residence back to Germany.

67. However, in this – as yet hypothetical – situation it is difficult to identify any specific interference with the very essence of the daughter's legal position under Union law.

iii) Interim conclusion

68. In light of the foregoing, it is not possible, on the basis of the Court's previous case-law, to derive, in a case such as that in the main proceedings, a right of residence for the third-country national, who has custody rights, in the Member State of origin of the Union citizen who is a minor.

69. However, detailed consideration has yet to be given in case-law as to whether, under the conditions obtaining in the main proceedings, a right of residence for a third-country national in the Member State of origin of a Union citizen can be established pursuant to primary law in order to guarantee fundamental rights in an effective manner.

23 — *Dereci and Others* (footnote 2), paragraphs 65 to 69.

b) Right of residence of a third-country national in order to guarantee fundamental rights in an effective manner

70. In *Dereci* the Court considered this possibility and ruled that: 'Thus, … if the referring court considers, in the light of the circumstances of the disputes in the main proceedings, that the situation of the applicants in the main proceedings is covered by European Union law, it must examine whether the refusal of their right of residence undermines the right to respect for private and family life provided for in Article 7 of the Charter. On the other hand, if it takes the view that that situation is not covered by European Union law, it must undertake that examination in the light of Article 8(1) of the ECHR.' [24]

71. Although the *Dereci* case concerned the issue of the joint residence of a Union citizen and a third-country national in the same Member State, the above considerations of the Court in its judgment in that case are so general that they appear also to be applicable to the situation in the present case, which involves two different Member States.

72. This issue must be considered below and in this respect it is first necessary to examine whether the Charter of Fundamental Rights is at all applicable in the present case. Under Article 51(1) of that Charter, in order for this to be so, there must be a connection with the implementation of Union law.

73. Consequently, it would not be sufficient for there to be a connection to purely national provisions with no element of Union law. [25] However, it must be concluded that there is a sufficient connection with the implementation of Union law where, although refusal of a residence permit under Union law does not constitute interference with the substance of the rights conferred by virtue of the status of citizen of the Union, it does constitute a less serious restriction of the right to free movement of the Union citizen who is a minor.

74. The contention that the Charter of Fundamental Rights is applicable in the context of restrictions on the fundamental rights is questioned by some legal writers with reference to Article 51 thereof, which takes 'implementing Union law' as a basis. [26] These concerns also apply to the right to freedom of movement enshrined in Article 21 TFEU. [27] However, the reference in the explanations relating to the Charter [28] to the case-law of the Court in which the applicability of the fundamental rights to measures restricting fundamental freedoms is recognised [29] militates in favour of applying the fundamental rights enshrined in the Charter also to restrictions on freedom of movement under Article 21 TFEU.

24 — *Dereci and Others* (footnote 2), paragraph 72.

25 — The referring court appears to consider this in Section B.1 of its list of questions.

26 — See, as regards the status of the dispute, Borowsky, M. in Meyer, J., *Charta der Grundrechte der Europäischen Union*, 3rd edition, Nomos Verlagsgesellschaft, Baden-Baden 2011, Art. 51, paragraphs 29 to 31; Ehlers, D. in Ehlers, D. *Europäische Grundrechte und Grundfreiheiten*, 3rd edition, De Gruyter, Berlin 2009, § 14, paragraph 53; and Jarass (footnote 16), § 4, paragraph 15.

27 — As regards its legal nature, see *Zhu and Chen* (footnote 8), paragraphs 39 to 41, and Case C-148/02 *Garcia Avello* [2003] ECR I-11613, paragraph 24; see also Seyr, S./Rümke, H.-C., 'Das grenzüberschreitende Element in der Rechtsprechung des EuGH zur Unionsbürgerschaft – zugleich eine Anmerkung zum Urteil in der Rechtssache Chen', EuR 2005, 667, 672 et seq., Calliess, C., 'Der Unionsbürger: Status, Dogmatik und Dynamik', EuR 2007, p. 7, 23 et seq., and, with reference to recital 2 in the preamble to Directive 2004/38, Graf Vitzthum, N., 'Die Entdeckung der Heimat der Unionsbürger', EurR 2011, pp. 550, 555, in particular footnote 29.

28 — See, to that effect, the explanation relating to Article 51 of the Charter of Fundamental Rights, to be found in OJ 2007 C 303, p. 32.

29 — See, for example, Case C-71/02 *Karner* [2004] ECR I-3025, paragraph 48 et seq., and the case-law cited therein; *Carpenter* (footnote 19), paragraph 40; and Case C-368/95 *Familiapress* [1997] ECR I-3689, paragraph 24.

i) Restriction of freedom of movement under Article 21 TFEU as a connecting factor for the applicability of the Charter of Fundamental Rights

75. Whether and, if so, to what extent a restriction of freedom of movement under Article 21 TFEU exists will depend ultimately on the circumstances of the individual case, the assessment of which is a matter for the referring court.

76. However, it is not possible to dismiss out of hand the possibility that the father's insecure future residence in Germany may potentially deter his minor daughter from further exercising her right of free movement as a Union citizen,[30] and consequently may constitute a restriction of that freedom, even though it does not amount to interference with the substance of the rights conferred by Union-citizen status within the meaning of the case-law to date.[31]

77. In this regard, the referring court might have to assemble more detailed facts since it is not clear from the content of the case-file how the applicant's possibly insecure residence will affect the future life plans of the mother and child.

78. None the less, it would appear plausible that the Union citizen – on the assumption that the relationship between the father and the daughter is trouble-free, as the case-file suggests – could be deterred all the more from exercising her right to freedom of movement if, as a result of a possible denial of a right of residence in Germany under Union law, there were a danger that her father, as a third-country national, would have to take up residence far away from her. However, in that respect, an overall assessment must be made and account must also be taken of the fact that the third-country national may, as noted by the German Government,[32] be entitled to have his national residence permit perpetuated under national law.

79. However, if it were concluded in this case that there is such a deterrent effect in denying a right of residence under Union law, and thus a restriction on the freedom of movement, fundamental rights would be applicable.

80. In this context it is necessary to give due regard to the fundamental freedoms and to ascertain, in particular, whether they do in fact ultimately confer on the third-country national a right of residence under Union law.

ii) Possibility of a right of residence established by the fundamental freedoms?

81. It follows from my foregoing observations that the Charter of Fundamental Rights applies, under the first sentence of Article 51(1) thereof, in so far as denial of the right of residence prejudices the daughter's right to freedom of movement under Article 21 TFEU and thus the implementation of Union law is concerned.

82. The right of the child to maintain on a regular basis a personal relationship and direct contact with both parents (Article 24(3) of the Charter) and respect for family life (Article 7 of the Charter) are particularly relevant in the present case in terms of fundamental rights.

30 — As regards the broad interpretation of the term 'restriction', see, for example, Case C-192/05 *Tas-Hagen and Tas* [2006] ECR I-10451, paragraph 30 et seq. and the case-law cited therein, and Case C-406/04 *De Cuyper* [2006] ECR I-6947, paragraph 39. See also, to that effect, point 69 of the Opinion of Advocate General Bot of 27 March 2012 in Case C-83/11 *Rahman and Others*.

31 — See, to that effect, the Commission's written observations, p. 21 et seq.

32 — See, to that effect, the written observations of the Federal Republic of Germany, paragraph 95 et seq.

83. However, whether or not denial of the right of residence constitutes interference with a fundamental right in this regard is unclear and depends on the specific circumstances of each case, which must be assessed by the referring court. [33]

84. If the father were denied the right of residence in Germany, this need not necessary impact on his opportunities to maintain regular contact with this child living in Austria. Rather, Article 24(3) of the Charter appears precisely to ensure that the father can also maintain contact with his child in Austria after she has exercised freedom of movement.

85. However, if it were to transpire in a particular case that denying a right of residence would rule out the possibility of maintaining regular personal relations, this could constitute interference with a fundamental right, the justification for which would have to been assessed from the standpoint of proportionality. In that context, it would be necessary to consider, among other things, whether the child's father who is a third-country national also actually exercises his right of custody and endeavours to fulfil his parental duties.

86. In this case a right of residence, based on fundamental rights, of the third-country national within the meaning of the *Dereci* judgment might be inferred from Article 24(3) of the Charter of Fundamental Rights, in conjunction with Article 7 thereof. [34]

87. It should also be pointed out that Article 8 of the ECHR, which is applicable to parent/child relationships even where the parents and the child no longer live permanently together under the same roof, [35] leads to a similar conclusion. Under Article 52(3) of the Charter of Fundamental Rights, the rights contained in the Charter which correspond to rights guaranteed by the ECHR have the same meaning and scope as the corresponding rights laid down by the ECHR. However, it is also expressly provided in Article 52(3) of the Charter of Fundamental Rights that that provision does not prevent EU law from providing more extensive protection. [36]

c) Interim conclusion

88. By way of interim conclusion, it must therefore be stated that, in the light of the fundamental rights guaranteed under Article 6(1) and (3) TEU, and in particular in the light of those enshrined in Articles 7 and 24 of the Charter of Fundamental Rights, a parent who has a right of custody and is a third-country national can, in order to maintain a personal relationship and direct parental contact on a regular basis, have a right of residence in the Member State of origin of his child who is a Union citizen under Articles 20 TFEU and 21 TFEU, if the child has moved from there to another Member State, exercising his right of free movement. For such a right of residence to exist, the denial thereof must have a restrictive effect on the child's right to freedom of movement and must be regarded as amounting to a disproportionate interference with fundamental rights in the light of the abovementioned fundamental rights. This is a matter for assessment by the referring court.

33 — See also, to this effect, point 78 of the Opinion of Advocate General Bot in *Rahman and Others* (footnote 30), in which, however, the residence of family members in the same Member State is at issue.

34 — As regards the relevance to the right of residence of primary law in conjunction with fundamental and human rights, see also points 74 and 79 of the Opinion of Advocate General Bot in *Rahman and Others* (footnote 30).

35 — See, to that effect, Karpenstein, U./Mayer, F.C., *EMRK*, C.H. Beck, Munich 2012, Art. 8, paragraphs 41 to 53 and the case-law cited therein, and Grabenwarter, C., *Europäische Menschenrechtskonvention*, 4th edition, C.H. Beck, Munich 2009, § 22, paragraphs 16 to 19, and, generally on the scope of the right enshrined in Article 8 ECHR, European Court of Human Rights judgments in *Ahmut v. the Netherlands*, 28 November 1996, § 71, *Reports of Judgments and Decisions* 1996-VI, *Gül v. Switzerland*, 19 February 1996, § 38, *Reports of Judgments and Decisions* 1996-I, and *Sen v. the Netherlands*, no. 31465/96, § 31, 21 December 2001.

36 — See my Opinion in *N.S. and Others* (footnote 18), point 143 et seq.

C – Right under European Union law to the issue of a 'residence card of a family member of a Union citizen'

89. Irrespective of whether the third-country national ultimately has a right of residence in Germany based on primary law in view of the fundamental rights to be observed, he cannot demand a 'residence card of a family member of a Union citizen' under Union law.

90. The requirements for the issue of this card are set out exhaustively in Article 10 of Directive 2004/38 and are specifically tailored to the right of residence conferred on third-country nationals by Directive 2004/38. For example, the presentation is required, in particular, of the registration certificate of the Union citizen whom the third-country national is accompanying or joining. The applicant in the main proceedings will be unable to demonstrate this to be the case precisely because he did not follow his daughter to Austria.

91. As in the case of the right to residence under substantive law, this provision too is incapable of application outside the scope of Directive 2004/38, and therefore there is no right to the issue of the above residence card under Union law. It is for the national court also to assess, if necessary, whether national law provides for the issue of such a card for any cases in which there is a right of residence under Union law, that is to say, also outside the scope of Directive 2004/38.

VI – Conclusion

92. In the light of all of the foregoing considerations, I propose that the Court should answer as follows the questions which have been referred for a preliminary ruling:

Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC does not confer on a parent who has custody rights and is a third-country national a right, in order to maintain a personal relationship and direct parental contact on a regular basis, to remain in the Member State of origin of his child, who is a Union citizen, to be documented by a residence card of a member of the family of a Union citizen, if the child, exercising his or her right of free movement, moves from there to another Member State.

In the light of the fundamental rights guaranteed under Article 6(1) and (3) TEU, and in particular those enshrined in Articles 7 and 24 of the Charter of Fundamental Rights of the European Union, a parent who has custody rights and is a third-country national may, in order to maintain a personal relationship and direct parental contact on a regular basis, have a right of residence in the Member State of origin of his child who is a Union citizen under Articles 20 TFEU and 21 TFEU, if the child, exercising his or her right of free movement, has moved from there to another Member State. In order for such a right of residence to exist, the denial thereof must have a restrictive effect on the child's right of free movement and must be regarded as constituting a disproportionate interference with fundamental rights in the light of the abovementioned fundamental rights. This is a matter which must be assessed by the referring court.

There is no right under European Union law to the issue of a residence card for members of the family of a Union citizen as documentary proof of this right of residence.