



Residence rights of third-country nationals

Fact of the case:

Mr Koji, a Japanese national, married the German citizen Irma in 1998. In 2004, their daughter Mia was born, who holds both the German and the Japanese citizenship. Initially the family settled in Munich, but in January 2008 the marriage was dissolved and Mrs Irma since then lives in Vienna, Austria with their daughter Mia, while Mr Koji continued to live in Munich. The parents have joint custody of the daughter and Mr. Koji regularly travels from Munich to Vienna to visit his daughter.

In May 2008, Mr Koji put forth a request to the relevant authority in Munich for a "Residence card of a family member of a Union citizen". The competent authority refused to grant the card on the basis of the German legislation transposing precisely the provisions of Directive 2004/38. The reason given is that Mr Koji does not accompany or goes to meet (in the sense of rejoining) a citizen of the Union, as his wife and daughter live in Austria, while he is asking for a permanent residence in Germany.

Arguments to be considered

There are several different instruments of secondary EU law regulating the right of third-country nationals to remain in the territory of the Member States. The same person may be entitled to resident status on a number of different grounds.

National legislation transposing an EU Directive may pursue other objectives, not necessarily governed by EU law, as long as the effectiveness of the Directive is safeguarded and there are no specific rules of European Union law on the matter or capable of affecting it.

Legal Framework

Relevant European Law

Directive 2004/38/EC on family reunification applies 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 who accompany or join them. The persons to be regarded as a 'family member' for the purposes of that directive are the spouse and the dependent direct relatives in the ascending line and those of the spouse or partner as defined in Article 2(2)(b).



Relevant National Law

The Law on residence economic activity and integration of foreigners in national territory, under the heading 'Family reunion to join Germans', provides that a residence permit is issued to the foreign a) spouse of a German, b) unmarried minor child of a German, c) parent of an unmarried minor German for the purpose of care of the child, if the German has his habitual residence in the national territory.

Under the heading 'Autonomous right of residence of spouses', the same law provides that in cases where marital cohabitation has ceased, the spouse's residence permit is extended by one year as an autonomous right of residence not dependant on the purpose of family reunion, if a) marital cohabitation has lawfully existed in national territory for at least two years, or b) the foreigner has died while marital cohabitation in national territory existed, and the foreigner was until then in possession of a residence permit, establishment permit or EC long-term residence permit, unless he was not able to apply for an extension in due time for reasons beyond his control. The requirement for marital cohabitation to have existed lawfully for two years in national territory is to be waived where it is necessary, in order to avoid particular hardship, to allow the spouse to continue to reside, unless an extension of the foreigner's residence permit is excluded.

Question

Can Mr Koji invoke the Charter of Fundamental Rights and which provisions in particular, so that he can obtain the residence card and thus be in constant contact with his daughter and the mother of his child?