

## **Joined Cases C-356/11 & C-357/11 O and S**

**Facts:** The applicant was a Ghanaian national, living in Finland with a permanent residence permit. She married a Finnish national and had a child of Finnish nationality. The applicant subsequently divorced her husband and maintained full custody of her child. She later re-married a national of Côte d'Ivoire, who applied for a residence permit on the basis of their marriage. The applicant had a second child, this time with her second husband. The child had Ghanaian nationality, and both parents had custody. The husband's application was refused, on the basis that he did not have the sources of subsistence, and there was no serious risk to the child of his deportation.

The second applicant was an Algerian national living in Finland with a permanent residence permit. She too married a Finnish national and had a child of Finnish nationality. She divorced and re-married an Algerian national, having a child of Algerian nationality. As in the first case, he was refused a residence permit.

The question in both cases was whether Art. 20 TFEU precluded a third country national from being refused a residence permit because of lack of means of subsistence in a family situation in which his spouse has custody of a child who is a citizen of the Union and the third country national is not the child's parent and does not have custody of the child.

**Held:** The Court first looked at Directive 2004/38, stating that is not all third country nationals who are family members of a Union citizen who derive rights of entry into and residence in a Member State from that directive, but only those who are family members of a Union citizen who has exercised his right of freedom of movement by settling in a Member State other than the Member State of which he is a national (following Case C 256/11 *Dereci and Others* [2011] ECR I 11315). On the facts, neither of the citizen children had made use of their right of free movement.

Nevertheless, since citizenship of the Union is intended to be the fundamental status of nationals of the Member States, the children of the previous marriages enjoyed rights under Art. 20(1) TFEU and therefore could rely on rights pertaining to that status. It would be for the national court, following Case C 34/09 *Ruiz Zambrano* [2011] ECR I 1177 whether the denial to give a residence permit to the fathers entails the denial of the genuine enjoyment of the substance of the rights conferred by the status of citizen of the Union.