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**The Right of Residence under Directive 2004/38 of the
Spouse of a Union Citizen
in the absence of a Valid Passport**

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Table of Contents

1. Introduction	4
2. The nature of the right of residence of the spouse of a Union citizen	5
2.1 The <i>ex lege</i> nature of the right of residence of a Union citizen	5
2.2 The <i>ex lege</i> nature of the right of residence of the family members of a Union citizen	6
2.3 The relationship between the right of residence and the issuing of a residence card	7
2.4 Sub-conclusion	8
3. Denial of the right of residence and/or residence card for absence of a valid passport	9
3.1 Valid passport as condition for the right of residence?	9
3.2 Valid passport as a condition for the residence card?	10
4. Conclusions	12

1. Introduction

The right of free movement of persons holding the nationality of one of the Member States of the European Union, is regulated in Articles 20(2)(a) and 21(1) of the Treaty on the Functioning of the European Union (hereinafter: TFEU).¹ According to these Articles, every Union citizen has the right to move and reside freely within the territory of the Member States. The TFEU confers a residence right directly upon every Union citizen staying in another Member State than his or her own.

This right of the Union citizen extends to his or her third country national family members, irrespective of their nationality, though the TFEU itself remains silent on this point. Their position is regulated by Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (henceforth: the Directive).² This Directive contains a compilation of the law governing free movement and residence as developed since 1957.³ It provides that third country nationals meeting the conditions laid down in the Directive derive an *ex lege* right of residence from the residence right of their EU citizen family member. The conditions for this right of residence and the definitions used in the Directive are however not always clear. One ambiguity concerns the relation between the requirement to show a valid passport and the right of residence of a third country national. Jeroen Maas, a Dutch lawyer specialised in immigration law, sought our advice on this issue after the Dutch authorities refused to recognise his client's right of residence due to the absence of a valid passport.

This expert opinion examines the relationship between and the conditions for the right of residence and the issuance of a residence card. More specifically, it seeks to answer the question whether a valid passport can be made a precondition to the right of residence and the issuance of a residence card in the case of a Union citizen's third country national spouse. Section 2 starts by explaining the nature of the right of residence of the Union citizen's spouse and its relationship with the issuance of a residence card. The possibility to deny the residence right and/or residence card because of the absence of a valid passport will be elaborated on in section 3. Finally, section 4 provides an overall conclusion.

¹ Before the entry into force of the TFEU the right of free movement was regulated by Article 18 of the Treaty establishing the European Community.

² Directive 2004/38 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 Directive 2004/38 [2004] OJ L 158/77.

³ Recital 4 of the Preamble to Directive 2004/38 and P. Boeles, M. Den Heijer, G. Lodder and K. Wouters, *European Migration Law* (Antwerp, Intersentia, 2009), p 51. Directive 2004/38 amends Regulation 1612/68 and repeals Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC and 90/364/EEC.

2. The nature of the right of residence of the spouse of a Union citizen

To understand the nature of the right to reside freely in the territory of a Member State as a spouse of a Union citizen, section 2.1 starts by explaining the *ex lege* nature of the right of residence of the Union citizen. The *ex lege* nature of the right of residence of the Union citizen's family members will be discussed in section 2.2. In the light of the foregoing, the relationship between the right of residence and the issuance of a residence card will be elaborated on in section 2.3. Section 2.4 provides an overall conclusion of this section.

2.1 The *ex lege* nature of the right of residence of a Union citizen

The right of Union citizens to reside freely in the territory of another EU Member State is regulated in Chapter III of the Directive. More specifically, it falls under the scope of Article 6 if it concerns a period of residence for up to three months and under Article 7 for a period over three months. This right exists for Union citizens who are workers, self-employed⁴ or students⁵ or have sufficient resources and medical insurance for themselves and for their family members⁶.

Recital 11 of the Preamble to the Directive states that Union citizens have a fundamental and personal right of residence in another Member State which is conferred on them directly by the Treaty⁷ and exists independently from fulfilment of administrative procedures. Accordingly, it should be borne in mind that the Directive is an instrument of secondary legislation implementing primary EU legislation and the obligations it imposes. Besides, it reaffirms existing case law on the *ex lege* nature of the right of residence as first introduced in 1976 by the European Court of Justice (hereinafter: the Court) in the *Royer* judgment.⁸ This means that the right of residence exists by virtue of law, as opposed to a right that can be granted. Documents associated with it are only declaratory of the right as opposed to constitutive.

That the right exists independently of any supporting documents and should not be restricted on the pretext of lack of any administrative documents is further supported by recital 14 of the Preamble to the Directive.⁹ This recital concerns the exercise of the right of residence by both the Union citizen and his or her family members and states that 'supporting documents should not constitute an undue obstacle to the exercise of the right of residence by Union citizens and their family members'. Similarly, Article 25(1) of the Directive states that 'administrative documents may under no circumstances be made a precondition for the exercise of a right or the completion of an administrative formality, as entitlement to rights may be attested by any other means of proof.' This too underscores the declaratory effect of any required documents serving only administrative purposes, as the entitlement to rights may be attested by any other means of proof.¹⁰

It should be concluded that there is no doubt that the right of a Union citizen to enter and reside freely in other Member States than his own, is conferred on him directly by the Treaty and the Directive and exists *ex lege*.

⁴ Article 7(1)(a) of the Directive.

⁵ Article 7(1)(c) of the Directive.

⁶ Article 7 (1)(b) of the Directive.

⁷ The Directive still refers to Article 18 of the Treaty establishing the European Community which was replaced by Article 21 TFEU.

⁸ CJEU Case 48/75 *Royer* [1976], para 31.

⁹ N. Rogers, R. Scannell, J. Walsh, *Free Movement of Persons in the Enlarged European Union* (Sweet and Maxwell, London, 2012), pp 182-187.

¹⁰ D. Chalmers, C. Hadjiemmanuil, G. Monti, A. Tomkins, *European Union Law, Texts and Materials* (Cambridge, Cambridge University Press, 2009), p 593.

2.2 The *ex lege* nature of the right of residence of family members of a Union citizen

In the case of family members accompanying or joining the Union citizen to another Member State it is not the TFEU but the Directive that directly confers to them a right of residence. However, the ratio for granting a residence right to family members is closely connected to the Treaty. Directive 2004/38 aims to facilitate the exercise of the primary and individual right to move and reside freely within the territory of the Member States that is conferred directly on Union citizens by Article 21(1) TFEU and it aims in particular to strengthen that right. Any rights conferred on third country nationals by provisions of EU law on Union citizenship are rights derived from the exercise of freedom of movement by a Union citizen.¹¹

The definition of family members of Union citizens is laid down in Article 2(2) of the Directive. It includes the spouse, the registered partner as referred to in Article 2(2)(b), the direct descendants under the age of twenty one of either the Union citizen or his or her spouse or registered partner and the dependent direct relatives in the ascending line of either the Union citizen or of his or her spouse or registered partner.

Like the right of residence of the Union citizen, the right of residence of the Union citizen's family member is conferred *ex lege* and exists regardless of any administrative formalities. This *ex lege* nature follows from the wording of Articles 7(1) and 7(2) of the Directive which state that '[a]ll Union citizens *shall* have the right of residence on the territory of another Member State' and that '[t]he right of residence provided for in paragraph 1 *shall* extend to family members who are not nationals of a Member State'. The Preamble further supports this. According to recital 6, family members included in the definition of Article 2(2) of the Directive 'enjoy an automatic right of entry and residence in the host Member State'. Recital 5 of the Preamble to the Directive states in this regard that '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'.

The *ex lege* nature of the right of residence of Union citizens and their family members also follows from the Court's case law. The *Oulane*¹² and *MRAX*¹³ judgments, which are dealing in depth with the independence of the right of residence from the compliance with administrative formalities, were decided before the entry into force of the Directive. The former in relation to Union citizens and the latter in regard of their third country nationals family members. More specifically, the Court stated in the *MRAX* judgment that 'where a person establishes family ties ... his right to enter the Community is not founded in any way on the visa but derives, pursuant to Community law, from the family ties alone'.¹⁴

Though the judgment in the *MRAX* case was delivered before the entry into force of the Directive there is no indication that it is no longer applicable. First, the Preamble to the Directive itself states in Recital 3 that the adoption of the Directive should strengthen the right of free movement and residence of all Union citizens. Secondly, it is standing case law of the Court that Union citizens cannot derive less rights from the Directive than from the instruments of secondary legislation which the Directive has either amended or repealed.¹⁵ Thirdly, Article 25 of the Directive repeats the declaratory nature of any administrative documents and thus codifies case law from before the entry into force of the Directive.

¹¹ CJEU Case C-456/12 *O and B* [2014], para 35, 36; CJEU Case C-202/13 *McCarthy Rodriguez* [2014], para 34.

¹² CJEU Case C-215/03 *Salah Oulane v Minister voor Vreemdelingenzaken en Integratie* [2005].

¹³ CJEU Case C-459/99 *Mouvement contre le racisme, l'antisémitisme et la xénophobie ASBL (MRAX)* [2002].

¹⁴ *Ibid*, para 51.

¹⁵ CJEU Case C-145/09 *Tsakouridis* [2010], para 23, Case C127/08 *Metock and Others* [2008], paras 59 and 82 and Case C162/09 *Lassal* [2010], para 30.

Further, the case law of the Court has remained consistent with the judgments in *Oulane* and *MRAX* after the Directive entered into force. According to the *Metock* judgment, the national of a non-member country who is a family member of a Union citizen derives the rights of entry and residence in the host Member State from the Directive. Member States have no discretion to restrict these rights on other grounds than those mentioned in Articles 27 or 35 of the Directive.¹⁶

2.3 The relationship between the right of residence and the issuance of a residence card

Article 7(2) of the Directive lays down the conditions which third country national family members in the meaning of Article 2 sub 2 of the Directive must meet in order to acquire a residence right for longer than three months:

1. they must accompany or join the Union citizen in the host Member State; and
2. the Union citizen must satisfy the conditions referred to in paragraph 1(a), (b) or (c) of the Directive

These conditions do not include the possession of any residence card. Article 9 of the Directive states that Member States shall issue a residence card to family members of a Union citizen, who are not nationals of a Member State, where the planned period of residence is more than three months. The relationship between the right of residence and this residence card will be explored on the basis of a contextual analysis of the Directive and case law. Combined reading of Articles 7, 10 and 25 in the context of the Directive as a whole, supports the view that the right of residence exists independently of the residence card.

First, the Directive deals with the right to reside and the residence card in separate provisions. Article 7 makes no mention of the residence card as a precondition to existence of such right. The residence card is addressed separately in Articles 9 and 10 of the Directive. Article 10 is the central provision that contains rules on formalities related to residence rights of non-EU nationals. This article explicitly states that the 'right of residence' shall be '*evidenced*' by a 'residence card for family members'. The wording of the article clarifies that the residence card is not the source of the right, but a means of proof, and supports the proposition that the right exists independently of the card.

Secondly, Article 25(1), which deals with general provisions concerning residence documents, elaborates on the relationship between the right and the card. This article prohibits making possession of the residence card a precondition to entitlement to rights. It thus excludes the possibility that the card is considered to be the source of the right. Further, it makes clear that the card is a means of proof of the residence right which can be replaced by other means of proof.

Thirdly, a reading of these articles in the context of the Directive as a whole supports the same conclusion. Recitals 11, 14 and 16 of the Preamble to the Directive are silent on the relationship between the right of residence and the residence card. Recital 11 clearly states that the residence right is not dependent upon having fulfilled administrative procedures. Recital 14 aims to limit the possibilities that supporting documents required for issuing a residence card become an undue obstacle to the exercise of the right of residence, by urging the states to adopt comprehensive rules regulating issuance of these documents thus also suggesting the importance of the right over the card. Recital 16 together with Article 14(2) on the retention of the right of residence, states that the right to residence exists as long as the conditions of Articles 7, 12 and 13 are met and one does not become an unreasonable burden on the social assistance system of the state. Articles 12 and 13 make no mention of the residence card.

¹⁶ CJEU Case C-120/08 *Metock* [2008], para 95 and CJEU Case C-202/13 *McCarthy Rodriguez* [2014], para 45.

Finally, neither the drafting history nor the provisions of the predecessors of the Directive¹⁷, suggest that the legislator would intend to make the right of residence dependent on the card. Although none of these provisions address the issue directly, their wording supports the view that the role of the card is not to create the right but to evidence it.

The case law of the CJEU is also clear about the fact that for EU citizens residence right exists separately from the residence card. In the case of *MRAX*¹⁸, regarding the situation of third country nationals married to Union citizens, the Court concluded that 'issue of a residence permit ... is to be regarded not as a measure giving rise to rights but as a measure by a Member state serving to prove the individual position ... with regard to provisions of Community law'.¹⁹

Directive 2004/38, being a compilation of the legislation and jurisprudence on free movement of Union Citizens and their family members, must be presumed to have incorporated the concepts laid down in the preceding *MRAX* and *Oulane* judgments, unless the Directive would expressly state otherwise. As was shown, the analysis of the text of the Directive itself should already lead to the conclusion that the residence right for family members exists independently from the issuance of a residence card. There is, accordingly, no reason to doubt the continued applicability of the *MRAX* and *Oulane* judgments.

2.4 Sub-conclusion

Family members of a Union citizen have the same right of free movement and residence as the Union citizen. Article 2(2) defines who should be considered a family member and includes the spouse of the Union citizen. The right of residence family members is conferred directly on them by the Directive. The residence right for Union citizens and their family members exists separately from the residence card.

¹⁷ See the wording of Article 4(2) of Directive 68/360/EEC and Article 4(1) of Directive 73/148/EEC.

¹⁸ CJEU Case C-459/99 *Mouvement contre le racisme, l'antisémitisme et la xénophobie ASBL (MRAX)* [2002].

¹⁹ *Ibid*, para 74.

3. Denial of the right of residence and/or the residence card for absence of a valid passport

As discussed under section 2, the Union citizen's right of residence in another Member State extends to his (third country national) family members who are accompanying or joining him. This right of residence is conferred directly by the TFEU, in the case of the Union citizen, and by the Directive, in the case of his or her family members. It exists *ex lege* and independently from a residence card. This section elaborates on the relationship between the right of residence and the residence card. In particular, this section discusses the possibility of denial of the residence right and/or card because of the absence of a valid passport.

Section 3.1 starts by explaining whether a valid passport can be made a condition to the right of residence. The possibilities to restrict an existing right of residence and expel a third country national family member of a Union citizen because he does not have a valid passport will be discussed in section 3.2. In this context the real life consequences of not having a residence card and the effectiveness of the residence right will be analysed.

3.1 Valid passport as a condition to the right of residence?

The function of a passport is generally to evidence the nationality and the identity of its bearer. Further a passport may be a tool for expelling a person to his country of origin. The issue of possessing a passport is relevant immediately when a person wishes to enter a State. This follows from Article 5(1) of the Directive which states that Member States shall grant Union citizens leave to enter their territory with a valid identity card or passport. Furthermore it provides that Member States shall grant family members who are not nationals of a Member State leave to enter their territory with a valid passport. Thus normally a valid passport is required to enter the territory of the Union. However, in the fourth section of the same article it is clarified that the requirement of a valid passport is not absolute. Article 5(4) of the Directive states:

Where a Union citizen, or a family member who is not a national of a Member State, does not have the necessary travel documents or, if required, the necessary visas, the Member State concerned shall, before turning them back, give such persons every reasonable opportunity to obtain the necessary documents or have them brought to them within a reasonable period of time or to corroborate or *prove by other means that they are covered by the right of free movement and residence* [emphasis added].

Article 5(4) Directive 2004/38 is a compilation of the *MRAX* judgment²⁰ and the *Oulane* judgment²¹. According to the *MRAX* judgment a Member State may not send back at the border:

a third country national who is married to a national of a Member State and attempts to enter its territory without being in possession of a valid identity card or passport or, if necessary, a visa, where he is able to prove his identity and the conjugal ties and there is no evidence to establish that he represents a risk to the requirements of public policy, public security or public health.²²

The Court elaborated on this approach in the *Oulane* judgment:

The presentation of a valid identity card or passport for the purpose of proving that a person is a Community national is an administrative formality the sole objective of which is to provide the

²⁰ CJEU Case C-459/99 *Mouvement contre le racisme, l'antisémitisme et la xénophobie ASBL (MRAX)* [2002].

²¹ CJEU Case C-215/03 *Oulane v Minister voor Vreemdelingenzaken en Integratie* [2005] paras 21 and 22.

²² CJEU Case C-459/99 *Mouvement contre le racisme, l'antisémitisme et la xénophobie ASBL (MRAX)* [2002], para 62.

national authorities with *proof of a right which the person in question has directly by virtue of their status*. If the person concerned is able to provide unequivocal proof of his nationality by means other than a valid identity card or passport, the host Member State may not refuse to *recognise his right of residence* on the sole ground that he has not presented one of those documents (see, to that effect, in the context of third country nationals, Case C-459/99 *MRAX* [2002] ECR I-6591, paragraph 62) [emphasis added].²³

From the emphasised parts of Article 5(4) and the judgments in *MRAX* and *Oulane* it emerges that the issue is about proving the *right to free movement and residence which a person has directly by virtue of his status*. The person concerned must be given the opportunity to provide unequivocal proof of this by other means than a valid identity card or passport.

This approach is in line with case law of the Court on evidentiary matters in other fields of EU law. There the Court held that the evidence required should enable authorities to ascertain a fact clearly and precisely. However, this evidence does not need to take any particular form and the assessment must not be conducted too formalistically.²⁴

Wider applicability of the evidentiary principle reflected in Article 5(4)?

The question should be raised whether the evidentiary principle reflected in Article 5(4) of the Directive exclusively applies to the passport requirement laid down in the same article, or also to other provisions of the Directive containing passport requirements. It does not seem logical that the Directive would make distinctions in that respect. Passport requirements can be found in Articles 5(1), 6(1, 2), 8(3, 5) and 10(2) of the Directive. They apply to various stages of the stay in a Member State (entry, stay for three months, stay for a longer period) and to registration of the legal stay or issuance of evidentiary documents. Also in these contexts it remains relevant to prove the existence of the right to free movement and residence. The mentioned evidentiary principle is thus not only relevant at the stage of entering the Host Member State but also during the following period of stay. It must therefore be inferred from Article 5(4) of the Directive that the requirement of a valid passport is not absolute – neither in the stage of entering the Host Member State, nor in the following stages of residence for three months or more.

Accordingly, Article 15(2) explicitly states that expiry of an identity card or passport on the basis of which the person concerned entered the host Member State and was issued with a registration certificate or residence card is insufficient to justify expulsion from the host Member State. Thus, an acquired right to legal stay for more than three months on the basis of Article 7 of the Directive is not terminated by the mere expiry of the valid passport with which the person already proved that he or she had the right to free movement and residence.

3.2 Valid passport as a condition to the residence card?

What is true for proving the right to residence should also be true for obtaining an official document evidencing that right, like the residence card for third country national family members. According to the wording of Article 10(2)(a) of the Directive, a Member State shall require presentation of a valid passport before issuing a residence card to the Union citizen's family member.

If this provision would contain an absolute requirement – in contrast with the evidentiary principle expressed in Articles 5(4) and 15(2) of the Directive - the ambiguous situation would arise in which a family member possesses the right of residence but is not issued a residence card. This would lead to practical consequences that most likely undermine the effectiveness of the right to reside. The card is of high importance for day-to-day life of a third country national family member for the following reasons:

²³ CJEU Case C- 215/03 *Oulane v Minister voor Vreemdelingenzaken en Integratie* [2005], paras 24 and 25.

²⁴ CJEU Case C-310/09 *Accor* [2011], para 99. See also CJEU Case C-199/82 *Spa San Giorgio* [1983], para 14 and CJEU Case C-262/09 *Meilicke* [2011], paras 43-47.

- The card plays a crucial role in respect of ‘evidencing’ a right to residence during police checks, which may be a part of a regular control of aliens.
- The legislative framework of the Member States requires proof of the right to reside through the residence card for most administrative formalities. A person who cannot provide such evidence is unable to open a bank account²⁵, obtain a social security number, which thwarts access the job market²⁶, or even to enter into contract with a mobile phone operator.²⁷ All these activities are central to the effectiveness of the residence right, but without the residence card they cannot be exercised.
- The residence card allows for an easier travel across the EU territory. Article 5(1) of the Directive stipulates that with a valid travel document and residence card a third country national family member of an EU citizen is exempted from visa requirements when entering the territory of Schengen Area in accordance with Regulation (EC) No 539/2001. Thus, if the family member does not have a residence card, the visa requirement continues to apply, further complicating the exercise of the right to free movement.

An absolute passport requirement for the issuing of a residence card would obstruct the effectiveness of the residence right of a third country national family member. Therefore, it is unlikely that the principle laid down in Articles 5(4) and 15(2) would not be applicable to the passport requirement of Article 10(2) of the Directive.

²⁵ See: www.madisonparker.nl/moving-to-holland/working-in-the-netherlands .

²⁶ See: ind.nl/EN/individuals/residence-wizard/eu/third-country-nationals.

²⁷ See: service.t-mobile.nl/app/persoonlijk/answers/detail/a_id/2498/toegestane-legitimatiebewijzen-bij-aankoop-t-mobile. This is an example of one of the Dutch mobile phone providers. In general, providers have the same conditions.

4. Conclusions

Family members of a Union citizen have the same right of free movement and residence as the Union citizen. Article 2(2) defines who should be considered a family member and includes the spouse of the Union citizen. The right of residence of family members is conferred directly on them by the Directive. Member States have no discretion to restrict these rights on other grounds than those mentioned in Articles 27 or 35 of the Directive.²⁸ The residence right for Union citizens and their family members exists separately from the residence card.

Article 5(4) of the Directive reflects the evidentiary principle that the entitlement to the right to free movement and residence does not need to be evidenced by a valid passport if it is possible to provide unequivocal proof by other means. This principle, which has been developed in the Court's case law and is also expressed in Article 15(2) of the Directive, is applicable to all provisions of the Directive containing passport requirements. It would be at odds with the system of the Directive if the evidentiary principles for proving the right to free movement and residence would vary according to the stage of the stay (entrance, short stay or longer stay) in the Member State. Thus, the requirement of a valid passport is not absolute – neither in the stage of entering the Host Member State, nor in the following stages of residence for three months or more.

This must also be true for the passport requirement in relation to the issuance of a residence card for family members with the nationality of a third country. The right of residence of a third country family member of a Union citizen comes into existence independently from the issuing of a residence card. So, if a residence card would be refused because of the lack of a valid passport, the residence right would still remain unaffected. However, in day-to-day life the residence card plays an important role for the effectiveness of the residence right. It protects the holder of the card against arbitrary measures of immigration control. It enables the holder to open a bank account, obtain a social security number and to enter into contracts. If the passport requirement laid down in Article 10(2) of the Directive would be absolute – in contrast with the principle reflected in Articles 5(4) and 15(2) – the effectiveness of the residence right, which exists *ex lege*, would seriously be undermined.

Proposed questions for preliminary ruling

Though this Expert opinion provides arguments for what is considered the most likely interpretation of the relevant provisions, there may be room for dispute. If a Court dealing with this topic would hesitate on this point, it should ask preliminary questions. In essence the content of these questions should be the following:

1. Is the evidentiary principle developed in the judgments of the Court in *MRAX* and *Oulane* and reflected in Articles 5(4) and 15(2) of Directive 2004/38, according to which the residence right of a family member accompanying or joining a Union citizen in the Host member State cannot be denied on the sole basis that a valid passport is lacking, provided that unequivocal proof of the nationality and identity is produced, applicable to all provisions in the Directive containing a passport requirement, that is Articles 4(1), 5(1), 6(1,2), 8(3, 5) and 10(2)?
2. Is there a difference in this regard between the passport requirement in relation to the right of residence and the passport requirement in relation to the issuance of a residence card?
3. Does the refusal of a residence card to a third country national family member of a Union citizen for the sole reason that a valid passport is lacking, while the nationality and identity of the family member can be proven with other means, render the exercise of the residence right impossible or excessively difficult and therefore infringe the principle of effectiveness?

²⁸ CJEU Case C-120/08 *Metock* [2008], para 95 and CJEU Case C-202/13 *McCarthy Rodriguez* [2014], para 45.