

Joined Cases C-424/10 and C-425/10

Tomasz Ziolkowski and Others and Marlon Szeja

v

Land Berlin

(Reference for a preliminary ruling
from the Bundesverwaltungsgericht)

(Freedom of movement for persons — Directive 2004/38/EC — Right of permanent residence — Article 16 — Legal residence — Residence based on national law — Period of residence completed before the accession to the European Union of the State of origin of the citizen concerned)

Opinion of Advocate General Bot delivered on 14 September 2011 I - 14038

Judgment of the Court (Grand Chamber), 21 December 2011 I - 14051

Summary of the Judgment

1. *Citizenship of the European Union — Right to move and reside freely in the territory of the Member States — Directive 2004/38 — Right of permanent residence of citizens of the Union*
(European Parliament and Council Directive 2004/38, Arts 7(1) and 16(1))
2. *Citizenship of the European Union — Right to move and reside freely in the territory of the Member States — Directive 2004/38 — Conditions governing the right of residence under Union law*
(European Parliament and Council Directive 2004/38, Art. 37)

3. *Citizenship of the European Union — Right to move and reside freely in the territory of the Member States — Directive 2004/38 — Right of permanent residence of citizens of the Union*
(European Parliament and Council Directive 2004/38, Arts 7(1) and 16(1))

1. Article 16(1) of 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 must be interpreted as meaning that a Union citizen who has been resident for more than five years in the territory of the host Member State on the sole basis of the national law of that Member State cannot be regarded as having acquired the right of permanent residence under that provision if, during that period of residence, he did not satisfy the conditions laid down in Article 7(1) of the directive.

residence which complies with the law of a Member State but does not satisfy the conditions laid down in Article 7(1) of Directive 2004/38 cannot be regarded as a ‘legal’ period of residence within the meaning of Article 16(1).

(see paras 34, 46-47, 51, operative part 1)

Taking into account the context in which it occurs and the objectives pursued by Directive 2004/38, the concept of legal residence implied by the terms ‘have resided legally’ in Article 16(1) of Directive 2004/38 must be construed as meaning a period of residence which complies with the conditions laid down in the directive, in particular those set out in Article 7(1). Consequently, a period of

2. Article 37 of 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 simply provides that the directive does not preclude the laws of the Member States from introducing a system that is more favourable than that established by the directive. That does not in any way mean, however, that the more favourable

provisions must be incorporated into the system introduced by the directive.

However, it is for each Member State to decide not only whether it will adopt such a system but also the conditions and effects of that system, in particular as regards the legal consequences of a right of residence granted on the basis of national law alone.

(see paras 49-50)

3. Periods of residence completed by a national of a non-Member State in the territory of a Member State before the accession of the non-Member State to the European Union must, failing any specific provisions in the Act of Accession, be taken into account for the purpose of

the acquisition of the right of permanent residence under Article 16(1) of 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, provided that those periods were completed in compliance with the conditions laid down in Article 7(1) of the directive.

Provided the person concerned can demonstrate that such periods were completed in compliance with those conditions, the taking into account of such periods from the date of accession of the Member State concerned to the European Union does not give retroactive effect to Article 16 of Directive 2004/38, but simply gives present effect to situations which arose before the date of transposition of that directive.

(see paras 62-63, operative part 2)