OPINION OF ADVOCATE GENERAL KOKOTT

delivered on 20 October 2009 [1]

I — Introduction

1. Can a Union citizen who is not gainfully employed and who does not have sufficient resources of her own claim a right of residence as her daughter's carer in the Member State in which her daughter, as the child of a former migrant worker, is in education?

2. That is the question which the Court of Appeal of England and Wales (Civil Division) [2] has put to the Court of Justice in this case. The Court of Justice thus has an opportunity to expand on its existing case-law in respect of Article 12 of Regulation (EEC) No 1612/68 [3] — in particular the judgment in *Baumbast and R* [4] — and to clarify the relationship of that provision to the new directive on the right of residence for Union citizens and their family members, adopted in 2004 (Directive 2004/38/EC). [5] The significance of these issues, not only for the many Union citizens who have left their own country and are living in other Member States, but also for the host States themselves, should not be underestimated.

3. A number of parallels can be drawn between the present case and pending Case C-310/08 *Ibrahim*, [6] which also relates to a reference for a preliminary ruling from the Court of Appeal. In both cases, individuals who were not gainfully employed and who did not have sufficient resources of their own made applications for housing assistance in England. Each application was made in reliance on the applicant's claimed right of residence in the United Kingdom in order to care for her children, who are minors and in education there. Unlike in *Ibrahim*, however, the application for social assistance in the

1 — Original language: German.

2 — Footnote not relevant to the English translation.

3 — Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475).

4 — Case C-413/99 *Baumbast and R* [2002] ECR I-7091.

5 — 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, (OJ 2004 L 158, p. 77, corrigenda in OJ 2004 L 229, p. 35, OJ 2005 L 30, p. 27, OJ 2005 L 197, p. 34, and in OJ 2007 L 204, p. 28).

6 — See, in regard to that case, the Opinion of Advocate General Mazák of today's date.

present case was made not by a national of a non-member country, but by a Union citizen who was previously employed in the United Kingdom and who still lives there.

II — Legal framework

A — *Community law*

4. The framework of Community law in this case comprises, on the one hand, Directive 2004/38 and, on the other, Regulation No 1612/68.

1. Directive 2004/38

5. Directive 2004/38 includes general provisions in Chapter I (Articles 1 to 3), rules on the right of residence in Chapter III (Articles 6 to 15) and rules on the right of permanent residence in Chapter IV (Articles 16 to 21).

6. According to the definition in Article 2(2)(c), for the purposes of Directive 2004/38 the term 'family member' means:

'the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b)'.

7. Article 7 of Directive 2004/38, which is headed 'Right of residence for more than three months', is worded (in extract) as follows:

'(1) All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:

(a) are workers or self-employed persons in the host Member State; or

(b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; or

(c) — are enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training; and

— have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority, by means of a declaration or by such equivalent means as they may choose, that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence; or

(d) are family members accompanying or joining a Union citizen who satisfies the conditions referred to in points (a), (b) or (c).

(2) The right of residence provided for in paragraph 1 shall extend to family members who are not nationals of a Member State, accompanying or joining the Union citizen in the host Member State, provided that such Union citizen satisfies the conditions referred to in paragraph 1(a), (b) or (c).

(3) For the purposes of paragraph 1(a), a Union citizen who is no longer a worker or self-employed person shall retain the status of worker or self-employed person in the following circumstances:

(a) he/she is temporarily unable to work as the result of an illness or accident;

(b) he/she is in duly recorded involuntary unemployment after having been employed for more than one year and has registered as a job-seeker with the relevant employment office;

(c) he/she is in duly recorded involuntary unemployment after completing a fixed-term employment contract of less than a year or after having become involuntarily unemployed during the first twelve months and has registered as a job-seeker with the relevant employment office. In this case, the status of worker shall be retained for no less than six months;

(d) he/she embarks on vocational training. Unless he/she is involuntarily unemployed, the retention of the status of worker shall require the training to be related to the previous employment.

(4) …'

8. In connection with the retention of the right of residence by family members in the event of death or departure of the Union citizen, Article 12(3) of Directive 2004/38 provides as follows:

'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.'

9. In addition, reference must be made to Article 16 of Directive 2004/38, which contains general rules for the right of permanent residence of Union citizens and their family members:

'(1) Union citizens who have resided legally for a continuous period of five years in the host Member State shall have the right of permanent residence there. This right shall not be subject to the conditions provided for in Chapter III.

…

(3) Continuity of residence shall not be affected by temporary absences not exceeding a total of six months a year, or by absences of a longer duration for compulsory military service, or by one absence of a maximum of

12 consecutive months for important reasons such as pregnancy and childbirth, serious illness, study or vocational training, or a posting in another Member State or a third country.

(4) Once acquired, the right of permanent residence shall be lost only through absence from the host Member State for a period exceeding two consecutive years.'

10. According to Article 40(1), Directive 2004/38 was to be transposed by the Member States by 30 April 2006.

2. Regulation No 1612/68

11. Regulation No 1612/68 is one of the precursors of Directive 2004/38 and was, in part, repealed by it. [7]

7 — See Article 38(1) of Directive 2004/38, which provided that Articles 10 and 11 of Regulation No 1612/68 were to be repealed with effect from 30 April 2006.

12. Until 30 April 2006, Article 10 of Regulation No 1612/68, which was repealed by Directive 2004/38, provided as follows:

'(1) The following shall, irrespective of their nationality, have the right to install themselves with a worker who is a national of one Member State and who is employed in the territory of another Member State:

(a) his spouse and their descendants who are under the age of 21 years or are dependants;

(b) dependent relatives in the ascending line of the worker and his spouse.

(2) Member States shall facilitate the admission of any member of the family not coming within the provisions of paragraph 1 if dependent on the worker referred to above or living under his roof in the country whence he comes.

(3) For the purposes of paragraphs 1 and 2, the worker must have available for his family housing considered as normal for national workers in the region where he is employed; this provision, however, must not give rise to discrimination between national workers and workers from the other Member States.'

13. Article 12 of Regulation No 1612/68, which continues to have effect notwithstanding the entry into force of Directive 2004/38, provides as follows:

'The children of a national of a Member State who is or has been employed in the territory of another Member State shall be admitted to that State's general educational, apprenticeship and vocational training courses under the same conditions as the nationals of that State, if such children are residing in its territory.

Member States shall encourage all efforts to enable such children to attend these courses under the best possible conditions.'

B — *National law*

14. The relevant national provisions are described in the order for reference as 'complex' and only a summary is provided, according to which the position under national law is as follows.

15. Under the Housing Act 1996, [8] housing assistance may be granted to 'eligible persons' who are homeless and who meet certain conditions.

16. Under section 185 of the Housing Act 1996, [9] a person is not eligible for housing assistance if 'he is a person from abroad who is ineligible for housing assistance'. In relation to England, the detail of the scheme is set out in a statutory instrument, the 'Eligibility Regulations'. [10]

17. Specifically, regulation 6(1) of the Eligibility Regulations provides that a person

8 — Housing Act 1996 (c. 52).

9 — Section 185 is in Part VII of the Housing Act 1996, entitled 'Homelessness'.

10 — The Allocation of Housing and Homelessness (Eligibility) (England) Regulations 2006 (SI 2006/1294).

who is not subject to immigration control is eligible for housing assistance only if he is habitually resident in the United Kingdom and also has a right to reside there. [11]

18. In that regard, in addition to British citizens, those who are to be treated as having a right to reside include Union citizens exercising their Community law right to enter and remain in the United Kingdom. [12] Union citizens are ineligible if their only right to reside is as a jobseeker or the family member of a jobseeker, or if they are exercising their initial right to reside in the United Kingdom for a period not exceeding three months. [13]

19. According to regulation 6(2) of the Eligibility Regulations, the following Union citizens, inter alia, are exempt from the habitual residence test: workers, self-employed persons, family members of a worker or a self-employed person, and persons with a right to reside permanently in the United Kingdom.

20. Finally, it should be noted that the provisions of Directive 2004/38 were implemented in the United Kingdom by The Immigration (European Economic Area) Regulations 2006, [14] which came into force on 30 April 2006.

III — The facts and the main proceedings

21. Ms Maria Teixeira was born on 7 March 1971 and is a Portuguese national. She came to England in 1989 and worked there as a cleaner between 1989 and 1991. She was accompanied by her husband, also a Portuguese national. The couple's daughter, Patricia, was born in the United Kingdom on 2 June 1991. Patricia entered education in the United Kingdom at a time when Ms Teixeira was not a worker. [15]

22. Ms Teixeira and her husband subsequently divorced; he too continues to live in England. On 13 June 2006, a court ordered

11 — Foreigners who are subject to immigration control are, in principle, ineligible for housing assistance (section 185(2) of the Housing Act 1996), unless they fall within a category of persons defined in regulation 5 of the Eligibility Regulations.

12 — The order for reference also mentions the category of Commonwealth citizens with the right of abode in the United Kingdom.

13 — Regulation 6(1)(b) of the Eligibility Regulations.

14 — SI 2006/1003.

15 — No information is given in the order for reference as to whether Ms Teixeira's husband was in employment in the United Kingdom at that time.

that Patricia should reside with her father, but that she could have as much contact with her mother as she wished. In November 2006, Patricia commenced a childcare course at the Vauxhall Learning Centre [16] in the London Borough of Lambeth. In March 2007, when she was 15 years old, she went to stay with her mother.

23. Ms Teixeira had intermittent periods of employment in the United Kingdom. She last worked in early 2005.

24. On 11 April 2007, Ms Teixeira applied to the London Borough of Lambeth [17] for housing assistance on the basis that she was homeless. The application was refused on the ground of Ms Teixeira's ineligibility for housing assistance. She objected, but the refusal was upheld.

25. Ms Teixeira appealed initially to the Lambeth County Court [18] against the refusal of housing assistance, but her appeal was unsuccessful. [19] The matter is now the subject of appeal proceedings before the referring court, the Court of Appeal of England and Wales (Civil Division).

26. According to the order for reference, Ms Teixeira accepts in the main proceedings that:

— she is not a worker, is not self-sufficient and does not have a right of residence under Article 7(1) of Directive 2004/38;

— she has not retained her status as a worker as she does not satisfy the requirements of Article 7(3) of Directive 2004/38; and

— she has no right of permanent residence under Article 16 of Directive 2004/38.

27. In the main proceedings, Ms Teixeira's claim to a right of residence in the United Kingdom is derived solely from the fact that,

16 — Footnote not relevant to the English translation.
17 — The London Borough of Lambeth is the local housing authority.
18 — Footnote not relevant to the English translation.
19 — Ms Teixeira's appeal was dismissed by the County Court by its judgment of 16 November 2007.

since March 2007, she has been the primary carer of her daughter Patricia who is in education in the United Kingdom and has a right of residence there pursuant to Article 12 of Regulation No 1612/68. [20]

IV — Reference for a preliminary ruling and proceedings before the Court of Justice

28. By order of 10 October 2008 the Court of Appeal stayed the proceedings and referred the following questions to the Court of Justice for a preliminary ruling:

'In circumstances where (i) a Union citizen came to the United Kingdom, (ii) the Union citizen was for certain periods a worker in the United Kingdom, (iii) the Union citizen ceased to be a worker but did not depart from the United Kingdom, (iv) the Union citizen has not retained her status as a worker and has no right to reside under Article 7 and has no right of permanent residence under Article 16 of Directive 2004/38, (v) the Union citizen's child entered education at a time when the Union citizen was not a worker but the child remained in education in the United Kingdom during periods when the Union citizen was in work in the United Kingdom, (vi) the Union citizen is the primary carer of her child, and (vii) the Union citizen and her child are not self-sufficient:

(1) does the Union citizen only enjoy a right of residence in the United Kingdom if she satisfies the conditions set out in Directive 2004/38?

or

(2) (i) does the Union citizen enjoy a right to reside derived from Article 12 of Regulation No 1612/68, as interpreted by the Court of Justice, without being required to satisfy the conditions set out in Directive 2004/38; and

(ii) if so, must she have access to sufficient resources so as not to become a burden on the social assistance system of the host Member State during their

20 — Ms Teixeira relies, in that regard, on the judgment in *Baumbast and R* (cited in footnote 4).

proposed period of residence and have comprehensive sickness insurance cover in the host Member State?;

(iii) if so, must the child have first entered education at a time when the Union citizen was a worker in order to enjoy a right to reside derived from Article 12 of Regulation No 1612/68, as interpreted by the Court of Justice, or is it sufficient that the Union citizen has been a worker at some time after the child commenced education?;

(iv) does any right that the Union citizen has to reside, as the primary carer of a child in education, cease when her child attains the age of 18?

(3) If the answer to question 1 is yes, is the position different in circumstances such as the present case where the child commenced education prior to the date by which Directive 2004/38 was to be implemented by the Member States but the mother did not become the primary carer and did not claim the right to reside on the basis that she was the primary carer of the child until March 2007, i.e. after the date by which the Directive was to be implemented?'

29. In the proceedings before the Court of Justice, written and oral submissions were made by the Danish Government, the Portuguese Government, the United Kingdom Government and the Commission of the European Communities, in addition to those of Ms Teixeira and the London Borough of Lambeth. [21] Written observations were also submitted by the EFTA Surveillance Authority.

V — Assessment

30. By its reference for a preliminary ruling, the referring court seeks, in essence, to determine whether a Union citizen in Ms Teixeira's position who is not gainfully employed enjoys a right of residence under Community law even if she is not financially self-sufficient, since the existence of such a right of residence is a prerequisite, under national law, for the grant of housing assistance applied for by Ms Teixeira.

21 — The hearing was held on 2 September 2009 immediately after the hearing in Case C-310/08 *Ibrahim*.

31. The opinions of the parties to the proceedings are divided in that regard.

32. Ms Teixeira takes the view that, as the carer of a daughter who is in education, she enjoys a right of residence in the United Kingdom that is derived from Article 12 of Regulation No 1612/68, and is not required to have sufficient resources or sickness insurance cover. The Commission and the EFTA Surveillance Authority agree with her in that respect. Furthermore, the Italian Government expressed the same view in *Ibrahim*. The Portuguese Government also came to that conclusion. [22] The London Borough of Lambeth, the Danish Government and the United Kingdom Government adopted a diametrically opposed position, as also, incidentally, did Ireland in *Ibrahim*.

33. First, I shall consider whether a Union citizen in Ms Teixeira's position can derive a right of residence as her child's carer from Article 12 of Regulation No 1612/68 alone (see Part A below). Second, I shall examine whether it is a prerequisite of such a right of residence that the applicant should have sufficient resources and comprehensive sickness insurance cover (see Part B below). Lastly, I shall turn my attention to the three time factors raised by the referring court in relation to any claims Ms Teixeira may have under Article 12 of Regulation No 1612/68 (see Part C below).

A — *Can a right of residence of a parent as carer be derived from Article 12 of Regulation No 1612/68?*

34. By the first part of its second question [23] the referring court asks, in essence, whether a right of residence can be derived from Article 12 of Regulation No 1612/68 in respect of a person who, as parent, cares for the child of a migrant worker in the host Member State, where that child is in education.

35. There can be no dispute about the fact that Article 12 of Regulation No 1612/68 contains a *right of access to education*: the children of a migrant worker who reside in the Member State in which that worker is or has been employed are entitled to 'be admitted to that State's general educational, apprenticeship and vocational training courses'. What is

22 — However, the Portuguese Government assumes that a right of permanent residence exists under Article 16 of Directive 2004/38, and its submissions are based on that assumption.

23 — Question 2(i).

in dispute, however, is whether that right of access to education is accompanied by a *right of residence* in the host Member State for the child and for the parent who is caring for that child.

36. Any right of residence of a parent as carer that may exist is ancillary to the child's right of residence. In other words, it is predicated on the child itself having a right of residence. I shall consider first, therefore, the right of residence of a child for the purpose of education (see section 1 below), and only then the right of residence of that child's carer (see section 2 below).

1. The child's right of residence for the purpose of education

37. The London Borough of Lambeth, the Danish Government and the United Kingdom Government all maintain that Article 12 of Regulation No 1612/68 contains nothing more than a right of access to education. The associated right of residence of the child, on the other hand, is not derived from Article 12. It was laid down originally in Article 10 of Regulation No 1612/68. Since the repeal of that provision, the right of residence has been governed by Directive 2004/38. [24]

24 — The same argument is put forward by Ireland in *Ibrahim*.

38. It is true that Article 12 of Regulation No 1612/68 does not give children the right *initially* to establish their residence in the host Member State. As the actual wording of Article 12 makes clear, children can claim a right of access to education only 'if such children are residing in [that State's] territory'. The children in question must, therefore, be children who have already taken up residence in the host Member State in order to live with a migrant worker, [25] since the right of access to education laid down in Article 12 derives from the fact that a child has followed its father or mother in their capacity as a migrant worker to the host Member State. [26]

39. If, however, the child has taken up residence in the host Member State as a family member of a migrant worker, or if it was actually born there — as in the case of Ms Teixeira's daughter in this instance — that child acquires an independent legal position under Article 12 of Regulation No 1612/68. Its right of access to education is, from then on, no longer subject to the retention by its father or mother of their status as a migrant worker in the host Member State. [27] A child whose parent 'has been employed' only in the past as a migrant worker in the host Member State also enjoys a right of access to education.

25 — Previously, Article 10(1)(a) of Regulation No 1612/68, in particular, provided a legal basis for taking up residence in this way. That provision has now been replaced by Article 7(1)(d) in conjunction with Article 7(1)(a) and Article 2(2)(c) of Directive 2004/38.

26 — Case 197/86 *Brown* [1988] ECR 3205, paragraph 30, and Case C-7/94 *Gaal* [1995] ECR I-1031, paragraph 27.

27 — Joined Cases 389/87 and 390/87 *Echternach and Moritz* [1989] ECR 723, paragraph 23, and *Baumbast and R* (cited in footnote 4), paragraphs 63 and 69.

40. Contrary to the view taken by some of the parties to the proceedings, the exercise of the right of access to education cannot, therefore, in any way be predicated on the child's retention throughout the period of its education of its special right of residence under Article 10(1)(a) of Regulation No 1612/68, [28] and thus on its continuing right to settle with a parent who is a migrant worker. [29] If that were not the case, children of *former* migrant workers, in particular, would for the most part lose the right of access to education under Article 12, since the parent who 'has been employed' in the host Member State will frequently have left that State after having been employed there, and it will therefore no longer be possible for that parent simply to live there with the child in a common family home. [30]

41. Article 12 of Regulation No 1612/68 does not refer to provisions relating to the right of residence in any other respect either, but deems it to be sufficient if a migrant worker's child wishing to pursue an education in the host Member State is already 'residing' there.

42. The associated *right* of a migrant worker's child who is residing in the host Member State *to remain* there for the purpose of education derives directly from Article 12 of Regulation No 1612/68, [31] since, having regard to its context and objectives, that provision cannot be interpreted restrictively, and must not be rendered ineffective. [32]

43. Article 12 of Regulation No 1612/68 is one of a number of provisions aimed at establishing the best possible conditions for the integration of the migrant worker's family in the society of the host Member State. [33] As the Court has emphasised, for such integration to come about, a child of a migrant worker must have the possibility of going to school and pursuing further education in the host Member State in order to be able to complete that education successfully. [34]

44. A migrant worker would have far less incentive to exercise his right to freedom of movement if he could not be sure that his children could obtain an education in the host

28 — This provision has since been replaced by Article 7(1)(d) in conjunction with Article 2(2)(c) of Directive 2004/38.

29 — *Gaal* (cited in footnote 26), paragraphs 20 to 23; see also my Opinion in Case C-302/02 *Laurin Effing* [2005] ECR I-553, point 58.

30 — See, for example, the facts underlying the judgment in *Echternach and Moritz* (cited in footnote 27), in relation to *Moritz*.

31 — See, to that effect, *Baumbast and R* (cited in footnote 4), paragraph 63; see also points 84 and 85 of the Opinion of Advocate General Geelhoed of 5 July 2001 in that case, and my Opinion in *Laurin Effing* (cited in footnote 29), point 55.

32 — *Baumbast and R* (cited in footnote 4), paragraph 74; see also Case C-291/05 *Eind* [2007] ECR I-10719, paragraph 43.

33 — Fifth recital in the preamble to Regulation No 1612/68; see, in that regard, Case 9/74 *Casagrande* [1974] ECR 773, paragraph 3; *Echternach and Moritz* (cited in footnote 27), paragraphs 20 and 21; Case C-308/89 *di Leo* [1990] ECR I-4185, paragraph 13; and *Baumbast and R* (cited in footnote 4), paragraph 50. See, to the same effect, recital 5 in the preamble to Directive 2004/38.

34 — *Echternach and Moritz* (cited in footnote 27), paragraph 21, and *Baumbast and R* (cited in footnote 4), paragraph 51.

Member State and complete that education successfully. [35] If every interruption or cessation of the migrant worker's employment in the host Member State also resulted in the automatic loss of his children's right of residence and, accordingly, they were obliged to interrupt their education, there is a risk of disadvantage in relation to their educational and career development. The children might, in those circumstances, be compelled to continue their education abroad, which, in view of the differences between national education systems and the languages of instruction used, could lead to significant problems. This disadvantage can be avoided only if the children of the migrant worker are given the opportunity — including, specifically, in terms of the right of residence — to continue and to complete their education and vocational training in the host Member State, irrespective of whether their parent is employed there as a migrant worker throughout the entire period of their education or training. This also offers the best means of ensuring that children of migrant workers can be fully integrated in the society of the host Member State.

45. Against that background, it would be contrary to the legal context of and objectives pursued by Article 12 of Regulation No 1612/68 for the exercise of the right of access to education to be subject to a separate right of residence of the child under other legislation. [36] Instead, Article 12 of Regulation No 1612/68 grants children in education a free-standing right of residence. [37]

46. Contrary to the view taken by some of the parties to the proceedings, that position has not been altered in any way by the entry into force of Directive 2004/38. There is nothing to indicate that the Community legislature intended, by its adoption of Directive 2004/38, to amend the then well-known provision that is Article 12 of Regulation No 1612/68, as interpreted by the Court, [38] or from then on to limit the substance of that provision to a mere right of access to education.

47. Directive 2004/38 amended Regulation No 1612/68 only in so far as it repealed Articles 10 and 11 of the regulation. However, the right of children of migrant workers to remain in the host Member State for the purpose of education is not founded on either of those provisions. Instead, as has been shown above, [39] that right of residence flows directly from Article 12 of Regulation No 1612/68, the substance of which was left untouched by Directive 2004/38.

35 — *Baumbast and R* (cited in footnote 4), paragraphs 52 and 53; see also point 90 of the Opinion of Advocate General Geelhoed in that case.

36 — See, to that effect, *Gaal* (cited in footnote 26), paragraphs 21 to 23 and 25.

37 — See in that respect, in particular, *Echternach and Moritz* (cited in footnote 27), *Gaal* (cited in footnote 26) and *Baumbast and R* (cited in footnote 4).

38 — See, in particular, the case-law cited in footnote 37.

39 — Points 38 to 45 of this Opinion.

48. It cannot be contended in opposition thereto that all rights of residence of Union citizens and their family members have now been consolidated in Directive 2004/38, and that, consequently, a free-standing right of residence can no longer be derived from Article 12 of Regulation No 1612/68. Admittedly Directive 2004/38 codified existing Community instruments which, until then, had determined the legal position of certain categories of person. [40] Moreover, the directive undeniably applies to all Union citizens and their family members. [41] Nevertheless, it does not contain comprehensive and definitive rules to govern every conceivable right of residence of those Union citizens and their family members.

49. Thus, for example, like the legislation that preceded it, Directive 2004/38 lacks express and comprehensive provision for the right of residence of parents who, although not gainfully employed, are the carers of Union citizens who are minors. [42] Furthermore, Directive 2004/38 does not include express provision as to the right of residence in a Union citizen's home State of family members who are not themselves Union citizens, in the event of that Union citizen returning to his home State. [43]

50. Nor does Directive 2004/38 comprehensively determine the questions at issue here concerning rights of residence in connection with the education of children of Union citizens.

51. Admittedly, children of a Union citizen who are in education may enjoy a right of residence in the host Member State as family members, in accordance with the general provisions of the directive. [44] However, a specific right of residence for children in education comparable to that of Article 12 of Regulation No 1612/68 is missing from Directive 2004/38. In particular, Article 12(3) of the directive does not establish any such free-standing right of residence for the purpose of education; instead, Article 12(3) presumes the existence of a right of residence and merely directs that it be retained in the event of the death or departure of a Union citizen, until such time as the child of that Union citizen has completed its studies. [45]

52. Article 12 of Regulation No 1612/68 and Article 12(3) of Directive 2004/38 are not

40 — Recitals 3 and 4 in the preamble to Directive 2004/38.

41 — Article 3(1) in conjunction with Article 1 of Directive 2004/38.

42 — See Case C-200/02 *Zhu and Chen* [2004] ECR I-9925.

43 — See Case C-370/90 *Singh* [1992] ECR I-4265, and *Eind* (cited in footnote 32).

44 — Children of a Union citizen can, first of all, claim a right of residence as family members under Article 7(1)(d) in conjunction with Article 2(2)(c) of Directive 2004/38. In addition, they can acquire a right of permanent residence under Article 16 of Directive 2004/38.

45 — The intention was thus to codify part of the previous case-law of the Court of Justice; see the Commission's Proposal of 23 May 2001 for a European Parliament and Council Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (COM(2001) 257 final; OJ 2001 C 270 E, p. 150), and also the Commission's Amended Proposal of 15 April 2003 for a Directive of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (COM(2003) 199 final).

identical. In terms of the scope of its application to individuals, Article 12(3) of the directive is wider than Article 12 of the regulation, because Article 12(3) also covers children of economically inactive Union citizens. In terms of its substantive scope, on the other hand, Article 12(3) of the directive is much narrower than Article 12 of the regulation, because the rule it lays down applies only in the event of the death or departure of a Union citizen.

53. It is clear from the absence from Directive 2004/38 of a free-standing, comprehensive right of residence for the purpose of education that, notwithstanding the entry into force of this directive, there is still scope to draw on Article 12 of Regulation No 1612/68 as a legal basis for rights of residence.

54. In the first place, this applies to children of migrant workers who are in education and who are already 21 years of age or older and not dependants. These children can no longer claim a general right of residence under Article 7(1)(d) of Directive 2004/38 because they do not qualify as family members. [46] On the other hand, the scope of application of Article 12 of Regulation No 1612/68 is neither restricted by age nor subject to the person in education being a dependant. [47]

55. In the second place, Article 12 of Regulation No 1612/68 remains relevant where it is the right of residence of children in education who are the children of *former* migrant workers that is at issue. As just stated, the relevant provision in Directive 2004/38 in the form of Article 12(3) is incomplete; it applies only in the event of death or departure but does not cover the children of a former migrant worker who has remained in the host Member State even after his employment has ended. The latter case does, however, fall within the scope of Article 12 of Regulation No 1612/68. [48]

56. It is unlikely that, when adopting Directive 2004/38, the Community legislature actually intended to leave Article 12 of Regulation No 1612/68 wanting in regard to the rights of residence of children in education, and to confer special rights of residence only on the persons referred to in Article 12(3) of the directive, since Directive 2004/38 aims, according to recital 3 in the preamble thereto, to simplify *and strengthen* the right of free movement and residence of all Union citizens.

46 — See Article 2(2)(c) of Directive 2004/38.

47 — *Gaal* (cited in footnote 26), paragraphs 20 to 23 and 25.

48 — *Baumbast and R* (cited in footnote 4), paragraphs 63 and 75.

For Union citizens to derive fewer rights from Directive 2004/38 than from the instruments of secondary legislation which it amends or repeals would be incompatible with those aims. [49]

57. Thus, notwithstanding the entry into force of Directive 2004/38, Article 12 of Regulation No 1612/68 continues to provide a separate legal basis for the right of residence of individuals who live, for the purpose of education, in the Member State in which their father or mother is or has been employed as a migrant worker.

2. The ancillary right of residence of the parent as carer

58. In so far as a child has a right under Article 12 of Regulation No 1612/68 to pursue an education in the host Member State, according to the case-law, the parent who is that child's primary carer also has a right of residence in that Member State on the basis of Article 12. [50]

59. This ancillary right of residence of the primary carer is often necessary in order to ensure that the child's right to education under Article 12 of Regulation No 1612/68 can be exercised, since the right of children of migrant workers to access to education in the host Member State could be rendered ineffective in certain circumstances if the children's parents were denied the opportunity to look after them personally during the period of their education and, to that end, to live with them in the host Member State. [51] A right of residence for the parent who is the primary carer, on the other hand, facilitates the exercise of the children's right to education. [52]

60. At the same time, the recognition of an ancillary right of residence of the parent who is the primary carer means that account is taken of the right of the child and his parents to respect for their family life, [53] which is laid down by Article 8(1) ECHR [54] and which has

49 — Case C-127/08 *Metock and Others* [2008] ECR I-6241, paragraph 59.

50 — *Baumbast and R* (cited in footnote 4), paragraph 75.

51 — See, to that effect, *Baumbast and R* (cited in footnote 4), paragraph 71; similarly — albeit in connection with the right of residence under Article 18(1) EC — *Zhu and Chen* (cited in footnote 42), paragraph 45.

52 — *Baumbast and R* (cited in footnote 4), paragraph 75.

53 — *Baumbast and R* (cited in footnote 4), paragraphs 68 and 72; similarly — albeit in a slightly different context — Case C-60/00 *Carpenter* [2002] ECR I-6279, paragraphs 38, 41 and 42; Case C-459/99 *MRAX* [2002] ECR I-6591, paragraphs 53 and 61; *Eind* (cited in footnote 32), paragraph 44; and *Metock* (cited in footnote 49), paragraphs 56 and 62.

54 — European Convention for the Protection of Human Rights and Fundamental Freedoms (signed in Rome on 4 November 1950). Although the Convention does not grant foreigners, as such, a right to enter or reside in a particular country, it may amount to interference with the right to respect for family life that is enshrined in Article 8(1) of the Convention if a person is refused entry to, or residence in, a country in which his close family resides; see, in that regard, the following judgments of the European Court of Human Rights: *Moustaquim v. Belgium*, 18 February 1991, § 36, Series A no 193, p. 18; *Boultif v. Switzerland*, no 54273/00, § 39, ECHR 2001-IX; and *Radovanovic v. Austria*, no 42703/98, § 30, 22 April 2004. For its part, the Court of Justice of the European Communities has acknowledged in respect of the European Union that the right to live with one's close family results in obligations for the Member States which may be negative, when a Member State is required not to deport a person, or positive, when it is required to let a person enter and reside in its territory (see the 'family reunion case', Case C-540/03 *Parliament* v *Council* [2006] ECR I-5769, paragraph 52).

since also been incorporated into Article 7 of the Charter of Fundamental Rights. [55]

61. Moreover, the children of migrant workers are thus assured of being admitted to educational courses in the host Member State 'under the best possible conditions' (second paragraph of Article 12 of Regulation No 1612/68) and 'under the same conditions as the nationals of that State' (first paragraph of Article 12 of Regulation No 1612/68). [56] Not least among these conditions is the condition that children and young people should be able to grow up in a close family environment, which normally entails living with their parents, or with the parent who is their primary carer.

62. Lastly, recognition of an ancillary right of residence for the parent who is the primary carer is also among the conditions for the best possible integration of children of migrant workers in the society of the host Member State. [57]

3. Interim conclusion

63. To sum up, it can therefore be concluded that:

Where a child of a Union citizen is in education in a Member State in which that Union citizen is or has been employed as a migrant worker, the parent who is the child's primary carer enjoys a right of residence in the host Member State that is derived from Article 12 of Regulation No 1612/68.

B — *Does the right of residence apply only if the claimant has sufficient resources and comprehensive sickness insurance cover?*

64. By its first question and the second part of its second question [58] the referring court asks, in essence, whether the right of residence of a person who is not gainfully employed but

55 — The Charter of Fundamental Rights of the European Union was initially solemnly proclaimed on 7 December 2000 in Nice (OJ 2000 C 364, p. 1) and then for a second time on 12 December 2007 in Strasbourg (OJ 2007 C 303, p. 1). Admittedly, it still does not produce binding legal effects comparable to primary law but it does, as a material legal reference, shed light on the fundamental rights which are protected by the Community legal order, particularly where an instrument of Community legislation expressly refers to it; see the 'family reunion' case (cited in footnote 54), paragraph 38, and point 108 of my Opinion of 8 September 2005 in that case; also Case C-432/05 *Unibet* [2007] ECR I-2271, paragraph 37. There is a reference to the Charter of Fundamental Rights in recital 31 in the preamble to Directive 2004/38.

56 — *Baumbast and R* (cited in footnote 4), paragraphs 68 and 73; see also points 91 and 92 of the Opinion of Advocate General Geelhoed in that case.

57 — *Baumbast and R* (cited in footnote 4), paragraph 68 in conjunction with paragraphs 50 to 52.

58 — Question 2(ii).

who, as parent, cares for the child of a migrant worker in the host Member State, where that child is in education, is subject to that person having sufficient resources and comprehensive sickness insurance cover — in other words, being financially 'self-sufficient'. [59]

65. Unlike the other parties to the proceedings, the London Borough of Lambeth, the Danish Government and the United Kingdom Government deem it necessary to restrict the rights flowing from Article 12 of Regulation No 1612/68 to persons who are financially self-sufficient.

66. The effect of this would be that a person in Ms Teixeira's position is precluded from deriving a right of residence from Article 12 of Regulation No 1612/68, because she does not currently have access to sufficient resources or any comprehensive sickness insurance cover for the United Kingdom.

67. No such requirement of self-sufficiency can, however, be inferred from the wording of Article 12 of Regulation No 1612/68, which is not to be interpreted restrictively. [60]

68. Nor does the previous case-law relating to Article 12 of Regulation No 1612/68 make the rights of residence of children and of the parents looking after them that are derived from that provision subject to any form of requirement of self-sufficiency. The judgments in *Echternach and Moritz* and *Baumbast and R*, in particular, are noteworthy in that regard:

— At no stage in the judgment in *Echternach and Moritz* was there any examination of the sufficiency of resources. The two students concerned were *not* denied recourse to Article 12 of Regulation No 1612/68, even though, in the main proceedings, they claimed not only a right of residence but also study finance intended, inter alia, to cover their maintenance costs, the costs of maintaining their dependants and the costs of health insurance, and which, at least in part, was in the nature of social assistance. [61]

— In *Baumbast and R*, the fact that Mr Baumbast had sufficient resources was mentioned only in relation to his own right of residence under Article 18 EC as a Union citizen who was not carrying on an economic activity. [62] The existence of sufficient resources was not, however, of

59 — Footnote not relevant to the English translation.

60 — *Baumbast and R* (cited in footnote 4), paragraph 74.

61 — *Echternach and Moritz* (cited in footnote 27), paragraphs 2, 32 and 35, and section I.1 of the Report for the Hearing; see, to the same effect, *di Leo* (cited in footnote 33), paragraph 9, and *Gaal* (cited in footnote 26), paragraphs 19 and 25.

62 — *Baumbast and R* (cited in footnote 4), paragraphs 19 and 87 to 94; see, to the same effect, *Zhu and Chen* (cited in footnote 42), paragraphs 13 and 27 to 33.

any significance in those parts of the judgment relevant to the present case, and which deal with the rights of residence of Mr Baumbast's wife and daughters under Article 12 of Regulation No 1612/68. [63]

69. No doubt the legislature proceeded on the assumption that the family members of a migrant worker who reside with him in the host Member State will generally have sufficient resources, either because they are themselves employed in the host Member State (Article 11 of Regulation No 1612/68), or because they are dependants of the migrant worker, who uses his income to pay for their maintenance and provides them with a home (Article 10(1) and (3) of Regulation No 1612/68).

70. However, in Regulation No 1612/68, the legislature did not make the existence of sufficient resources a prerequisite for residence in the host Member State. On the contrary, under Article 7(2) of Regulation No 1612/68, migrant workers are entitled to the same social advantages as national workers, [64] and, by virtue of Article 12 of Regulation No 1612/68, this entitlement also extends to their children in so far as they are pursuing an education in the host Member State. [65]

71. The absence of any requirement of self-sufficiency from Regulation No 1612/68 represents a significant difference between this regulation and a number of directives adopted subsequently, in which the rights of free movement and residence of Union citizens not gainfully employed were made expressly subject to evidence of sufficient resources and comprehensive sickness insurance cover, [66] as the EFTA Surveillance Authority has rightly pointed out.

72. None the less, the London Borough of Lambeth, the Danish Government and the United Kingdom Government take the view that Article 12 of Regulation No 1612/68 must also now be regarded as being subject to a requirement of self-sufficiency. They infer this from Directive 2004/38, which has since come into force and in the light of which, they say, Article 12 of Regulation No 1612/68 must henceforth be interpreted and applied.

63 — See *Baumbast and R* (cited in footnote 4), paragraphs 47 to 63 and 68 to 75.

64 — These social advantages include, for example, old-age allowances for relatives in the ascending line; see, in that regard, Case 261/83 *Castelli* [1984] ECR 3199, paragraph 12; Case 157/84 *Frascogna* [1985] ECR 1739, paragraphs 21 to 25; and Case 256/86 *Frascogna* [1987] ECR 3431, paragraphs 6 to 9.

65 — See *Echternach and Moritz* (cited in footnote 27), paragraph 34; *di Leo* (cited in footnote 33), paragraphs 14 and 15; and *Gaal* (cited in footnote 26), paragraph 30.

66 — See Article 1(1) of Council Directive 90/364/EEC of 28 June 1990 on the right of residence (OJ 1990 L 180, p. 26), and Article 1(1) of Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity (OJ 1990 L 180, p. 28); also Article 1 of Council Directive 93/96/EEC of 29 October 1993 on the right of residence for students (OJ 1993 L 317, p. 59).

73. This is not a compelling argument.

74. As has already been stated, [67] it would be contrary to the aims pursued by Directive 2004/38 if the normative scope of Article 12 of Regulation No 1612/68 was restricted on account of that directive. As we know, Directive 2004/38 aims to simplify *and strengthen* the right of free movement and residence of all Union citizens. [68] It would be incompatible with those aims for Union citizens to derive fewer rights from Directive 2004/38 than from the instruments of secondary legislation which it amends or repeals. [69]

75. In addition to these general considerations, however, the proposition that the rights derived from Article 12 of Regulation No 1612/68 are restricted to financially self-sufficient individuals alone is also countered by the assessments of the legislature as expressed in Directive 2004/38.

76. Directive 2004/38 does not in any way make all rights of residence of Union citizens and their family members subject, as a rule, to the self-sufficiency of the person concerned. Instead, the already common distinction between two categories of right of residence is maintained in this directive. [70] The rights of Union citizens not gainfully employed and their family members are, in principle, subject to evidence of sufficient resources and comprehensive sickness insurance cover (Article 7(1)(b) and (c) in conjunction with Article 7(1)(d) of Directive 2004/38), whereas the rights of Union citizens who are in employment and of their family members are not subject to any such restriction (Article 7(1)(a) in conjunction with Article 7(1)(d) of Directive 2004/38).

77. The rights that can be derived from Article 12 of Regulation No 1612/68 fall within the latter category; they are enjoyed by the family members of Union citizens who are or have been employed as migrant workers in the host Member State. That is why — even taking into account the legislature's assessments underpinning Directive 2004/38 — it is inappropriate to make those rights subject to the self-sufficiency of the persons concerned.

78. This conclusion is confirmed on examination of Article 12(3) of Directive 2004/38, which provides that, in the event of the death or departure of a Union citizen from the host Member State, the right of residence of his children who are in education, and that of the parent who is the children's primary carer, are

67 — See, in that regard, point 56 of this Opinion above.
68 — Recital 3 in the preamble to Directive 2004/38.
69 — *Metock* (cited in footnote 49), paragraph 59.
70 — See, in that regard, point 71 of this Opinion.

preserved until the children have completed their studies. Unlike a number of related provisions concerning the retention of rights of residence,[71] Article 12(3) of Directive 2004/38 is not subject to the financial self-sufficiency of the children and their parent; it does not make evidence of sufficient resources and of comprehensive sickness insurance cover a prerequisite for residence in the host Member State.

79. Admittedly, the present case, as such, is outside the scope of Article 12(3) of Directive 2004/38 because neither of the parents of the child, Patricia, who is in education, has died or departed from the United Kingdom. Article 12(3) does, however, demonstrate that the legal position of children in education and of their parent carers is afforded special significance by Directive 2004/38, and that they are privileged by comparison with other family members of Union citizens.

80. Overall, therefore, the legislature's current assessment, as expressed in Directive 2004/38, suggests that the rights of residence flowing from Article 12 of Regulation No 1612/68 should not henceforth be subject to the financial self-sufficiency of the child who is in education or of the parent who is looking after that child.

81. No doubt the effect of this broad interpretation of Article 12 of Regulation No 1612/68, which is already apparent in the case-law of the Court of Justice cited above, may be that individuals such as Ms Teixeira and her daughter, who are not financially self-sufficient, will claim social assistance in the host Member State. However, that should not, under normal circumstances, result in an unreasonable burden on public funds or on the social assistance systems of the host Member State since, by being or having been employed as a migrant worker, the father or mother of the child in education will have contributed to that State's public funds and social assistance systems by paying taxes and social assistance contributions. Such a financial contribution is also made by migrant workers in employment in the host Member State, viewed as a group.

82. Moreover, a certain degree of financial solidarity by the host Member State with nationals of other Member States has, until now, already been inherent in all Community instruments relating to the rights of free

71 — See Article 12(2), second subparagraph, and Article 13(2), second subparagraph, of Directive 2004/38. The same applies in respect of Article 12(1), second subparagraph, and Article 13(1), second subparagraph, in so far as they apply in conjunction with Article 7(1)(b) or (c) of Directive 2004/38.

movement and residence, not least in regard to persons not gainfully employed. [72] This idea finds renewed expression in the preamble to Directive 2004/38 in that, even during a person's initial period of residence in the host Member State, recourse to the social assistance system is not categorically ruled out, although it should not become an unreasonable burden on the system. [73] In addition, Article 14(3) of Directive 2004/38 provides that an expulsion measure is not to be the automatic consequence of a Union citizen's or his or her family member's recourse to the social assistance system.

83. Naturally, the principle of financial solidarity with nationals of other Member States does not require the host Member State to tolerate abuse, since it is a general legal principle of Community law that the application of a rule of Community law cannot be extended to cover abusive practices. [74] This principle has also been reflected in Article 35 of Directive 2004/38. [75] Accordingly, it remains open to the Member States to put an end to abuse of the rights contained in Article 12 of Regulation No 1612/68. Whether or not there has been abuse must, however, be examined objectively on the basis of a comprehensive appraisal of all the circumstances of the individual case and cannot be inferred from mere recourse to the rights granted by Article 12 of Regulation No 1612/68. [76]

84. In the present case, there is no compelling evidence that Ms Teixeira's or her daughter's reliance on Article 12 of Regulation No 1612/68 is abusive, or that they might avail themselves unreasonably of the financial solidarity of the host Member State.

85. At the time of her application for housing assistance, Ms Teixeira had been living in the United Kingdom continuously for approximately 18 years. [77] Her daughter Patricia is a Union citizen who was born in the host Member State and, presumably, pursued her entire education there. Subject to other findings of fact by the referring court, it may, therefore, be assumed that both Ms Teixeira's situation and that of her daughter represents a relatively high level of integration in the host

72 — Case C-184/99 *Grzelczyk* [2001] ECR I-6193, paragraph 44; see also *Baumbast and R* (cited in footnote 4), paragraphs 91 to 93, and Case C-456/02 *Trojani* [2004] ECR I-7573, paragraphs 34 and 45.

73 — Recital 10 in the preamble to Directive 2004/38.

74 — Case C-212/97 *Centros* [1999] ECR I-1459, paragraph 24 and case-law cited; see also *Singh* (cited in footnote 43), paragraph 24; Case 39/86 *Lair* [1988] ECR 3161, paragraph 43; and Case C-413/01 *Ninni-Orasche* [2003] ECR I-13187, paragraph 36.

75 — See, in that regard, *Metock* (cited in footnote 49), paragraph 75.

76 — See, to that effect, *Lair* (cited in footnote 74), paragraph 43, and Case C-109/01 *Akrich* [2003] ECR I-9607, paragraph 55; similarly, in relation to tax law, Case C-478/98 *Commission* v *Belgium* [2000] ECR I-7587, paragraph 45, and Case C-196/04 *Cadbury Schweppes and Cadbury Schweppes Overseas* [2006] ECR I-7995, paragraphs 36 and 37.

77 — The United Kingdom Government maintains that Ms Teixeira once interrupted her residence for a period of several months. However, there is nothing to that effect in the order for reference. In any event, such a minor interruption would not be liable to jeopardise Ms Teixeira's permanent integration in the United Kingdom; see, in that regard, the legislature's assessment in Article 16(3) of Directive 2004/38.

Member State. In those circumstances, a certain degree of financial solidarity by the Member State appears to be justified so far as they are concerned.

86. To sum up, it can therefore be concluded that:

The right of residence which flows from Article 12 of Regulation No 1612/68 of a parent who is the primary carer of the child of a migrant worker, where that child is in education, is not subject to a requirement that that parent should have sufficient resources and comprehensive sickness insurance cover.

C — *Time factors*

87. Finally, it is necessary to consider the impact of the three time factors raised by the referring court on the right of residence of a person in Ms Teixeira's position.

1. At what point must the person who is in education have been the child of a migrant worker?

88. By the third part of its second question [78] the referring court asks, in essence, at what point the person in education must have been the child of a migrant worker in order for Article 12 of Regulation No 1612/68 to apply. Specifically, it asks whether that provision is relevant only if the parent looking after the child who is in education was already employed as a migrant worker in the host Member State when the child first entered education.

89. The background to this question is that Ms Teixeira was *not* gainfully employed in the United Kingdom at the time when her daughter Patricia first entered education, but only before Patricia first attended school and, intermittently, during the period of her education. Against that background, the referring court is doubtful whether Patricia — and thus ultimately also her mother as carer — is now in a position to invoke Article 12 of Regulation No 1612/68.

90. It must be observed in that regard that Article 12 of Regulation No 1612/68 is not

78 — Question 2(iii).

confined in its scope to cases in which a parent of the child in education had the status of migrant worker just when the child first entered education.

91. The very wording of Article 12 shows that it applies equally to children whose parent 'is employed' in the territory of the host Member State and to those whose parent 'has been employed' there. The children of former migrant workers are, therefore, as entitled to rely on Article 12 as are the children of Union citizens who have active migrant worker status. There is nothing in Article 12 to indicate that children of former migrant workers might have only a limited right of access to education in the host Member State.

92. As has already been pointed out, Article 12 of Regulation No 1612/68 cannot be interpreted restrictively. [79] It is aimed at establishing the best possible conditions for the integration of the migrant worker's family in the society of the host Member State and protecting that worker's children from disadvantage in relation to their educational and career development. [80]

93. It would be incompatible with these aims for the rights derived from Article 12 of Regulation No 1612/68 to be coupled with a qualifying-date rule. Instead, this provision always confers on a child — and thus also on its primary carer as such — a right of residence for the purpose of education as soon as that child has installed itself in the host Member State during the exercise by its parent of rights of residence as a migrant worker in that State. [81] It is irrelevant whether that parent was employed in the host Member State as a migrant worker just at the time when the child first entered education. This was also accepted by the United Kingdom Government at the hearing before the Court.

94. Although Ms Teixeira was not gainfully employed in the United Kingdom at the time when her daughter first attended school, she was nevertheless employed there intermittently while her daughter was pursuing her education. In the absence of other findings of fact, I am assuming that Ms Teixeira's activities were not purely marginal and ancillary, but that they were real and genuine activities which she carried out at the direction of others and for which she was paid. Accordingly Ms Teixeira had migrant worker status in the United Kingdom from time to time during the period of her daughter Patricia's education. [82]

79 — *Baumbast and R* (cited in footnote 4), paragraph 74.

80 — See points 43 and 44 of this Opinion above.

81 — *Baumbast and R* (cited in footnote 4), paragraph 63; similarly also, *Brown* (cited in footnote 26), paragraph 30.

82 — For the definition of 'worker', see settled case-law, in particular Case C-138/02 *Collins* [2004] ECR I-2703, paragraph 26; *Trojani* (cited in footnote 72), paragraph 15; Case C-213/05 *Geven* [2007] ECR I-6347, paragraph 16; and Joined Cases C-22/08 and C-23/08 *Vatsouras and Koupatantze* [2009] ECR I-4585, paragraph 26.

95. Even if it was assumed, therefore, that Patricia commenced her education in the United Kingdom solely on the basis of national law, rather than on the basis of Article 12 of Regulation No 1612/68, Ms Teixeira's subsequent intermittent employment has, in any event, provided a sufficient starting point for the application of Community law.

96. This, at least from a current perspective, allows Patricia to continue and to complete her studies in the United Kingdom in reliance on Article 12 of Regulation No 1612/68. Consequently, Patricia's mother, Ms Teixeira, can also now rely on that provision in her capacity as carer. [83]

97. To sum up, therefore:

The right of residence which flows from Article 12 of Regulation No 1612/68 of a parent who is the primary carer of the child of a migrant worker, where that child is in education, is not subject to a requirement that that parent should have been employed as a migrant worker in the host Member State when the child first entered education. It is sufficient for the child to have installed itself in the host Member State during the exercise by a parent of rights of residence as a migrant worker in that State.

2. What are the effects of the child reaching the age of majority on the parent's right of residence as carer?

98. By the fourth part of its second question, [84] the referring court asks, in essence, whether the right of residence in the host Member State enjoyed by a person who, as parent, looks after the child of a migrant worker — where that child is in education — comes to an end automatically when that child reaches the age of majority.

99. The background to this question is that Patricia, Ms Teixeira's daughter, was already 15 years of age when Ms Teixeira applied for housing assistance, and is now 18 and has thus reached the age of majority according to the law of the United Kingdom.

100. Since I assume that the relevant basis for the claim in the present case is Article 12 of Regulation No 1612/68, from which rights of residence can be derived both for Ms Teixeira and for her daughter, I shall consider the referring court's question in relation to that

83 — See, in that regard, points 58 to 62 of this Opinion.

84 — Question 2(iv).

provision. The following remarks may, however, be applied to any rights of residence that a parent, as carer, may derive from Directive 2004/38, for example, from Article 12(3) of the directive.

101. The starting point for the answer to this question should be the premiss that the rights of a child and those of its carer that flow from Article 12 of Regulation No 1612/68 do not necessarily have the same period of validity.

102. The child's reaching the age of majority does not have a direct effect on the child's original rights. [85] Both the right of access to education laid down in Article 12 of Regulation No 1612/68 and the associated right of residence are, according to their object and purpose, [86] valid until the child has completed its studies. Nowadays, that point in time will, in most cases, not be reached until after the child reaches the age of majority, especially since the scope of Article 12 of Regulation No 1612/68 also extends to higher education. [87]

103. The position may be different, however, in regard to the ancillary right of residence of the parent who is the child's primary carer. It is true that the regular, physical presence of that parent is intended to enable the child to pursue an education under the best possible conditions. [88] This only applies, however, for so long and in so far as it is necessary for the child to be looked after personally by a parent so as not to render ineffective the child's right of access to education. [89]

104. Contrary to the view taken by the United Kingdom, I should not consider it appropriate in this regard to introduce a fixed age-limit to coincide with the child's reaching the age of majority, since, as can be seen from Article 10(1)(a) of Regulation No 1612/68 and Article 2(2)(c) of Directive 2004/38, the Community legislature also recognises that, even after reaching the age of majority, it may be necessary for a child to continue to live with its parents or with one parent for some time. [90] Depending on the circumstances of the individual case, living together in a common family home may be precisely what is required in order to ensure that a child is able to pursue and to complete its studies.

85 — See, to that effect, *Gaal* (cited in footnote 26), paragraph 25; see also *Echternach and Moritz* (cited in footnote 27); it is apparent from the Report for the Hearing in that case that both students concerned were over the age of 18.

86 — See, in that regard, points 43 and 44 of this Opinion above.

87 — *Gaal* (cited in footnote 26), paragraph 24; *di Leo* (cited in footnote 33) also involved higher education — see paragraph 4.

88 — See point 61 of this Opinion above.

89 — See point 59 of this Opinion above; similarly also the Opinion of Advocate General Geelhoed in *Baumbast and R* (cited in footnote 4), point 94, last sentence.

90 — Although the current case does not fall within the scope of Article 10(1)(a) of Regulation No 1612/68 or Article 2(2)(c) of Directive 2004/38 because it does not concern the right of residence of a child living with its parents, but rather the ancillary right of residence of the parent living with its child. Nevertheless, it can be inferred from the assessment that finds expression in those provisions that it was not the Community legislature's intention either in 1968 or in 2004 to impose a fixed age-limit in relation to the law of rights of residence that would, necessarily, coincide with the child's reaching the age of majority.

105. Such might be the case, for example, where children reach the age of majority in the run-up to an important examination, such as the German *Abitur* (school-leaving examination); as a rule, they continue to need to be looked after by their parents or by one parent until they have taken the examination in question. Equally, such might be the case where mentally or physically disabled children need special care and attention in their day-to-day life as they pursue their education, even after they have reached the age of majority.

106. If, on the other hand, there are no such special circumstances, the authorities of the host Member State are entitled to assume that the child of a migrant worker no longer needs to be looked after by its parents once it has reached the age of majority. The child has become a young adult. It is no longer in its parents' custody and, in practice also, needs at most financial support rather than the regular physical presence of a parent or to live with that parent in a common family home.

107. Naturally, any right of permanent residence that may have been acquired by that parent during his lawful residence in the host Member State while looking after his child remains unaffected (Article 16 of Directive 2004/38).

108. To sum up, it must be concluded that:

The right of residence in the host Member State enjoyed by a person who, as parent, looks after the child of a migrant worker — where that child is in education — ends when that child reaches the age of majority, unless the circumstances of the individual case are such that it is appropriate for the child to be looked after personally by that parent beyond that point so as to ensure that the child is able to pursue and complete its studies.

3. Is it relevant whether the child's education started before or after Directive 2004/38 entered into force? (third question)

109. The third question referred for a preliminary ruling arises only in the event of an affirmative answer to the first, that is, if a person in Ms Teixeira's position can claim a right of residence only on the basis of Directive 2004/38. Since I am proposing that the Court rule that a right of residence may be

derived from Article 12 of Regulation No 1612/68 and thus, ultimately, answer the first question in the negative, [91] I shall address the third question only in the alternative.

110. By the third question, the referring court asks, in essence, whether the right of residence of a person who becomes the parent carer of the child of a migrant worker as from March 2007 — where that child is in education — may be subject to any restrictions under Directive 2004/38, notwithstanding the fact that the child first entered education before the end of the period within which the directive was required to be transposed, that is before 30 April 2006.

111. As Ms Teixeira has been her daughter's primary carer only since March 2007, that is the earliest date from which she can claim a right of residence as the parent of a child in education, irrespective of when the child actually first entered education. In regard to *this* right of residence as carer, therefore, Ms Teixeira cannot claim any kind of protection by virtue of vested rights, in order to escape the application of Directive 2004/38 or the national legislation transposing the directive. Nor is there any retroactive effect. Instead, the relevant principle is that new rules apply, as a matter of principle, immediately to the future effects of a situation which arose under the old rule. [92]

112. Accordingly, the third question, in so far as it arises, should be answered in the negative.

113. Whether the position is otherwise as regards the primary right of Ms Teixeira's daughter Patricia to an education and residence because she first entered education long before the end of the period for transposing Directive 2004/38 can be left open in this case since, according to the order for reference, what is at issue in the main proceedings is only whether Ms Teixeira has a right of residence herself, as a prerequisite for being granted housing assistance under national law.

114. In any event, however, it follows from the solution I have proposed [93] that neither Ms

91 — See, in that regard, points 34 to 63 and 64 to 86 of this Opinion.

92 — Case 143/73 *SOPAD* [1973] ECR 1433, paragraph 8; Case C-162/00 *Pokrzeptowicz-Meyer* [2002] ECR I-1049, paragraph 50; and Case C-334/07 P *Commission* v *Freistaat Sachsen* [2008] ECR I-9465, paragraph 43.

93 — See, in that regard, points 64 to 86 of this Opinion.

Teixeira's right of residence nor that of her daughter is subject to any restrictions under Directive 2004/38.

117. According to the information provided by the referring court, Ms Teixeira has resided in the United Kingdom continuously since 1989, thus for a period of considerably more than five years. [94]

D — *Final remarks*

118. There is nothing in the order for reference to suggest that Ms Teixeira's residence in her capacity as a migrant worker in the period from 1989 to 1991, or her residence subsequently, might have been illegal. In any event, the mere fact that Ms Teixeira was not continuously employed as a worker in the United Kingdom is not sufficient for a presumption of illegal residence. Instead, under Community law, she could, from time to time, have enjoyed a right of residence in the United Kingdom as a Union citizen not gainfully employed [95] or — before her divorce — as the wife of a migrant worker. [96]

115. Finally, it seems appropriate to make two further, brief remarks concerning Ms Teixeira's possible right of permanent residence in the United Kingdom and her right to equal treatment as a Union citizen.

1. Possible right of permanent residence

119. Furthermore, consideration should be given to whether Ms Teixeira was not in this case also entitled under national law to remain in the United Kingdom for certain periods of time, independently of Community law, since, under Article 16(1) of Directive 2004/38, a

116. According to Article 16(1) of Directive 2004/38, Union citizens who have resided legally for a continuous period of five years in the host Member State are to have the right of permanent residence there.

94 — Even the single interruption of Ms Teixeira's residence for a period of several months alleged by the United Kingdom Government in the proceedings before the Court would, in so far as it was found to have occurred, be insignificant according to Article 16(3) of Directive 2004/38.

95 — Article 1 of Directive 90/364 or Article 7(1)(b) of Directive 2004/38.

96 — Article 10(1)(a) of Regulation No 1612/68 or Article 7(1)(d) in conjunction with Article 7(1)(a) and Article 2(2)(a) of Directive 2004/38.

Union citizen must only have resided *legally* for a continuous period of five years in the host Member State in order to acquire a right of permanent residence. This applies primarily to Union citizens who have resided in the host Member State 'in compliance with the conditions laid down in this Directive' during a continuous period of five years. [97] None the less, according to Article 37, Directive 2004/38 expressly does not affect any more favourable laws, regulations or administrative provisions laid down by a Member State.

120. Against that background, it cannot be ruled out that Ms Teixeira has, in the meantime, acquired a right of permanent residence in the United Kingdom pursuant to Article 16 of Directive 2004/38, which would, in future, release her from the obligation to prove that she has sufficient resources and comprehensive sickness insurance cover. [98] It is surprising, therefore, that Ms Teixeira accepted in the main proceedings that she was not entitled to a right of permanent residence. The mere fact that Ms Teixeira may not have had a certificate of permanent residence is, in any event, irrelevant to the existence of any right of permanent residence, since such a document has only declaratory force. [99]

97 — Recital 17 in the preamble to Directive 2004/38.

98 — Article 16(1), second sentence, of Directive 2004/38 provides that the right of permanent residence is not to be subject to the conditions provided for in Chapter III of the directive. Article 16(4) goes on to state that, once acquired, a right of permanent residence can be lost only through an absence for a period exceeding two consecutive years.

99 — Case C-123/08 *Wolzenburg* [2009] ECR I-9621, paragraphs 49 to 51, especially paragraph 51; see also Article 19 of Directive 2004/38.

121. Since, however, the referring court expressly refers to the fact that the right of permanent residence is no longer at issue in the main proceedings, the Court is not called upon to consider the point in further detail. [100] This does not, however, absolve the national authorities from the obligation, upon application by Ms Teixeira, to reexamine whether the conditions for a right of permanent residence were satisfied or, at any rate, have since been satisfied.

2. The right to equal treatment

122. In so far as Ms Teixeira is residing legally in the United Kingdom, irrespective of whether her right of residence arises under Community law or only under national law, as a Union citizen she has a right to equal treatment under Article 18 EC in conjunction with Article 12 EC. [101] As the Court stated in *Trojani*, and as the Commission correctly pointed out in the proceedings before the Court, Union citizens can, in reliance on this right, claim social assistance in the host Member State for a limited period. [102]

100 — See, to that effect, Case 247/86 *Alsatel* [1988] ECR 5987, paragraphs 7 and 8.

101 — In so far as Ms Teixeira's right of residence arises under Community law, she can also base a claim to equal treatment on Article 24 of Directive 2004/38.

102 — *Trojani* (cited in footnote 72), paragraphs 39 to 45.

VI — Conclusion

123. In the light of the foregoing considerations, I propose that the Court should respond to the reference for a preliminary ruling from the Court of Appeal (Civil Division) as follows:

(1) Where a child of a Union citizen is in education in a Member State in which that Union citizen is or has been employed as a migrant worker, the parent who is the child's primary carer enjoys a right of residence in the host Member State that is derived from Article 12 of Regulation (EEC) No 1612/68.

(2) The right of residence of that parent is not subject to a requirement that that parent should have sufficient resources and comprehensive sickness insurance cover.

(3) The right of residence of that parent is not subject to a requirement that that parent should have been employed as a migrant worker in the host Member State when the child first entered education. It is sufficient for the child to have installed itself in the host Member State during the exercise by a parent of rights of residence as a migrant worker in that State.

(4) The right of residence of that parent ends when the child reaches the age of majority, unless the circumstances of the individual case are such that it is appropriate for the child to be looked after personally by that parent beyond that point so as to ensure that the child is able to pursue and complete its studies.