2. If five years' continuous residence as a worker prior to 30 April 2006 does not qualify to give rise to the permanent right of residence created by Article 16(1) of Directive 2004/38/EC, does such continuous residence as a worker give rise to a permanent right of residence directly pursuant to Article 18(1) of the EU Treaty on the grounds that there is a lacuna in the Directive?

(1) 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 L 158, p. 77

(2) Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families
OJ L 257, p. 13

Appeal brought on 18 August 2009 by the Office for Harmonisation in the Internal Market (Trade Marks and Designs) against the judgment delivered by the Court of First Instance (Fifth Chamber) on 3 June 2009 in Case T-189/07 Frosch Touristik GmbH v Office for Harmonisation in the Internal Market (Trade Marks and Designs)

(Case C-332/09 P)

(2009/C 256/27)

Language of the case: German

Parties

Appellant: Office for Harmonisation in the Internal Market (Trade Marks and Designs) (represented by: B. Schmidt, Agent)

Other parties to the proceedings: Frosch Touristik GmbH, DSR touristik GmbH

Form of order sought

— Set aside the judgment under appeal and refer the case back to the Court of First Instance;

— Order the other parties to the proceedings to pay the costs of the proceedings at first instance and of the appeal.

Pleas in law and main arguments

This appeal is brought against the judgment of the Court of First Instance annulling the decision of the Fourth Board of Appeal of the Office for Harmonisation in the Internal Market of 22 March 2007, by which the Board of Appeal dismissed the respondent's appeal against the decision of the Cancellation Division declaring the Community word mark 'FLUGBÖRSE' invalid in part. The Court of First Instance took the view that the Board of Appeal had erred in its application of Article 51(1)(a) of Regulation (EC) No 40/94 by focusing, in its examination as to whether registration of the mark was precluded by grounds for refusal under Article 7 of Regulation No 40/94 and whether the mark should therefore be declared invalid, on the circumstances and perception as at the date of registration of the mark at issue, instead of the date of filing of the application. According to the judgment under appeal, the only date relevant for the purposes of the assessment of an application for a declaration of invalidity is the date of filing of the application for the mark at issue. Moreover, in support of its view, the Court relied on the argument that that is the only interpretation which avoids a situation in which the probability of the mark losing its registrability increases with the length of the registration procedure. On a re-examination of grounds for refusal put forward subsequently, the examiner may take account of material subsequent to the date of filing of the application for registration only where that material enables conclusions to be drawn on the situation as it was on that date.

The appellant takes the view that the Court of First Instance misinterpreted Article 51(1)(a) of Regulation No 40/94 in so far as it deemed the date of filing of the application for registration of the mark to be the only date relevant for the purposes of assessment. This narrow interpretation is incompatible with the wording of Article 51(1)(a) and cannot be reconciled with its spirit and purpose, or with the system of protection and of the revocability of such protection under the Community trade mark regulation.

Article 51(1)(a) of Regulation No 40/94 provides for a mark to be removed from the register if it *'has been registered'* contrary to Article 7. The Court's conclusion that this wording merely sets out the circumstances in which a mark is to be refused registration or declared invalid, and that it does not (also) refer to the date for the examination, is unsustainable on the basis of the wording alone. Since no further grounds are provided by the Court, it is not clear which particular considerations caused the Court to reach its conclusion. The interpretation advanced by the appellant, that the phrase *'has been registered'* is, at the very least, also a reference to the relevant point in time, is, on the other hand, by far the more obvious interpretation in view of the wording.

However, the Court's interpretation in the judgment under appeal is also inconsistent with the notion of protection underlying Articles 7 and 51, whereby registrations which are contrary to the public interest are to be refused altogether, or, if they do proceed, may be revoked. This is the only way to avoid marks being registered contrary to the provisions of Regulation No 40/94 and thereby in disregard of the public interest underlying that provision. If the Court is right in its view, not only would an applicant for registration of a mark be able to secure protection for marks in respect of which absolute grounds for refusal of registration existed at the date of registration, but it would be impossible to cancel those marks

following registration pursuant to Article 51 of Regulation No 40/94, because they would have been registrable at the date of filing of the application and any developments between the date of filing and registration would be expressly disregarded by the Court. According to the appellant, this means that an individual would be given unjustified preferential treatment as against the public interest which merits protection, which would be incompatible with the protective purpose of Articles 7 and 51 of Regulation No 40/94.

Finally, as regards the Court's argument concerning the duration of the procedure, it should be noted that this can depend on a great number of factors, not only those within the appellant's control, but also the applicant's, or — as in the case of the conduct of the pre-registration opposition procedure provided for in Regulation No 40/94 — factors which may be determined by third parties. Furthermore, absolute grounds for refusal, which may not have been influenced, or been capable of being influenced, by the appellant, can arise at very short notice. In a proper assessment of opposing interests in such *ad hoc* situations, the public interest should be given priority, particularly since, before registration, applicants cannot be absolutely certain that they will be granted the protection sought. In such cases, it is appropriate, therefore, to take account also of developments up to the date of registration.

For those reasons, the judgment under appeal of the Court of First Instance should, therefore, be set aside on the grounds of a breach of Article 51 of Regulation No 40/94.

Reference for a preliminary ruling from the Conseil de Prud'hommes de Caen (France) lodged on 20 August 2009 — Sophie Noël v SCP Brouard Daude as liquidator in the judicial liquidation of Pronuptia Boutiques Province SA, and Centre de Gestion et d'Étude AGS (C.G.E.A.) IDF Est

(Case C-333/09)

(2009/C 256/28)

Language of the case: French

Referring court

Conseil de Prud'hommes de Caen (France)

Parties to the main proceedings

Applicant: Sophie Noël

Defendants: SCP Brouard Daude as liquidator in the judicial liquidation of Pronuptia Boutiques Province SA, and Centre de Gestion et d'Étude AGS (C.G.E.A.) IDF Est

Questions referred

1. Article 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms, entitled 'Prohibition of discrimination', provides: 'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'

   Is there discrimination in that there is different treatment of employees dismissed for economic reasons who have accepted a personal redeployment agreement, whose right to contest the breach of their contract remains subject to the five-year limitation period, and those who have refused it, who are subject to the one-year limitation period referred to in Article L.1235-7 of the Code du travail (Labour Code)?

2. Article 26 of the International Covenant on Civil and Political Rights of 16 December 1966 — which is merely the basis of Article 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms — provides: 'All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'

   Must a French court thus, pursuant to Article 55 of the French Constitution of 4 October 1958, apply the provisions of Article 26 of the International Covenant on Civil and Political Rights of 16 December 1966 and disregard the discriminatory provisions of Article L.1235-7 of the Code du travail which derive from an ordinary law, No 2005-35 of 18 January 2005, subsequent to 4 February 1981, the date on which the International Covenant entered into force in national territory?

Action brought on 25 August 2009 — Commission of the European Communities v Kingdom of Spain

(Case C-340/09)

(2009/C 256/29)

Language of the case: Spanish

Parties

Applicant: Commission of the European Communities (represented by: S. Pardo Quintillán and D. Recchia, Agents)

Defendant: Kingdom of Spain