OPINION OF ADVOCATE GENERAL MAZÁK

delivered on 20 October 2009 [1]

1. In the present case the Court of Appeal (England and Wales) (Civil Division) (United Kingdom) referred to the Court for a preliminary ruling under Article 234 EC three questions on the interpretation of Article 12 of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community [2] and 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. [3]

2. The questions were raised in proceedings between Ms Nimco Hassan Ibrahim, a third-country national who is married to a Danish national who previously worked in the United Kingdom and has school-going children who are Danish nationals, and the London Borough of Harrow (the 'Borough') concerning Ms Ibrahim's eligibility for housing assistance in the United Kingdom. Ms Ibrahim and her children are not self-sufficient and are dependent upon social assistance in the United Kingdom. The Secretary of State for the Home Department (the 'Secretary of State') is an intervener in the proceedings in question. In accordance with United Kingdom law, Ms Ibrahim is not entitled to housing assistance if she does not have a right of residence in that Member State pursuant to Community law. The Court of Appeal seeks guidance, inter alia, on whether Ms Ibrahim and her children have a right of residence under Directive 2004/38 or under Article 12 of Regulation No 1612/68 and if so, whether they must have access to sufficient resources so as not to become a burden on the United Kingdom social assistance system during their proposed period of residence and have comprehensive sickness insurance cover in that Member State.

1 — Original language: English.
2 — OJ, English Special Edition 1968(II), p. 475.
3 — OJ 2004 L 158, p. 77.

I — Legal background

A — *Community legislation*

3. Article 10 of Regulation No 1612/68 prior to its repeal by Directive 2004/38 provided:

'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.'

4. Article 12 of Regulation No 1612/68 provides:

'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.'

5. Article 12 of Directive 2004/38, entitled 'Retention of the right of residence by family members in the event of death or departure of the Union citizen', provides in paragraph 3:

'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.'

6. Article 14(2) of Directive 2004/38 provides:

'Union citizens and their family members shall have the right of residence provided for in Articles 7, 12 and 13 as long as they meet the conditions set out therein.'

B — *National legislation*

7. Pursuant to Article 6(1) of the Immigration (European Economic Area) Regulations 2006 ('2006 Regulations') a 'qualified person' with a right to reside in the United Kingdom means a person who is an EEA national and in the United Kingdom as a jobseeker; a worker; a self-employed person; a self-sufficient person; or a student. In accordance with Article 19(3)(a) of the 2006 Regulations, a person who has been admitted to, or acquired a right to reside in, the United Kingdom under the Regulations may be removed from the United Kingdom if he does not have or ceases to have a right to reside under the Regulations.

8. Pursuant to the Housing Act 1996 and the Allocation of Housing and Homelessness (Eligibility) Regulations 2006, Ms Ibrahim is not entitled to housing assistance if she does not have a right of residence in that Member State pursuant to Community law.

II — The main proceedings and the questions referred for a preliminary ruling

9. Ms Ibrahim is a third-country national. She is married to but separated from a Danish citizen, hereinafter referred to as 'Mr Y'. Mr Y came to the United Kingdom in 2002 and worked there from October 2002 until May

2003. From June 2003 to March 2004, Mr Y claimed incapacity benefit, but this ceased when he was declared fit to work at the end of that period. Mr Y left the United Kingdom shortly thereafter, returning to the United Kingdom in December 2006. In between ceasing work and leaving the United Kingdom, Mr Y ceased to be 'a qualified person' pursuant to Article 6 of the 2006 Regulations. On his return to the United Kingdom in December 2006, Mr Y did not regain the status of 'a qualified person' with a right to reside pursuant to United Kingdom law.

10. Ms Ibrahim came to the United Kingdom with the permission of the immigration authorities in February 2003 in order to join her husband. They have four children, all of whom are Danish citizens. In October 2007 their ages ranged from 9 to 1. The three older children came to the United Kingdom with their mother in February 2003. The fourth child was born in the United Kingdom. The two eldest started in State education shortly after their arrival in the United Kingdom, and remain in such education.

11. Following her husband's departure from the United Kingdom in 2004, Ms Ibrahim separated from him. She was not and is not self-sufficient. She does not work and relies entirely on means-tested benefits to pay her basic living expenses and housing costs. She has no comprehensive medical insurance and is reliant upon the United Kingdom National Health Service.

12. In January 2007 Ms Ibrahim applied to the Borough for homelessness assistance for herself and her children. By decision dated 1 February 2007 the Borough found Ms Ibrahim ineligible for housing assistance since neither she nor her husband were exercising a Community law right to reside in the United Kingdom. Upon statutory review, the Borough's housing review officer confirmed, by letter dated 29 March 2007, the decision of the Borough of 1 February 2007, on the same grounds. As of the date of the review Mr Y had not engaged in any kind of employment and was and is reliant upon State benefits.

13. Ms Ibrahim appealed the decision of the Borough to the Clerkenwell and Shoreditch County Court which on 18 October 2007 allowed her appeal. The County Court found, inter alia, that Ms Ibrahim's two older children who were at school had a right to reside under Article 12 of Regulation No 1612/68 in order to complete their education and thus Ms

Ibrahim had a derivative right to reside as their primary carer. That court also found that their right to reside in the United Kingdom was independent of any question of self-sufficiency.

14. The Borough appealed the judgment of the County Court to the referring court. The Borough considers that Directive 2004/38 is the sole source of conditions governing rights of residence in Member States for citizens of the European Union and for members of their families. According to the referring court, the Borough claims that it is common ground that Ms Ibrahim and her children do not have rights of residence within the United Kingdom pursuant, in particular, to Article 12(3) of Directive 2004/38 as Mr Y had ceased to be a worker in the United Kingdom before he departed from the United Kingdom in 2004. Directive 2004/38 has not left untouched Article 12 of Regulation No 1612/68 and the *Baumbast and R*[4] decision based upon it. According to the Borough, Article 12 of Regulation No 1612/68 was the source of a worker's child's right of access to education in the host Member State, but upon the repeal of Article 10 of Regulation No 1612/68, which was the source of rights of residence under that regulation, the right of access to education contained in Article 12 of that regulation is now subject to the altered conditions laid down in Directive 2004/38. In any event, any retained right of residence for the family, after the Union citizen's departure from the host Member State, must itself depend on their self-sufficiency. The principles of self-sufficiency and proportionality are essential principles of Community law, to balance the needs of the citizen and the State. The condition of self-sufficiency is not required of the migrant worker and his family, but it is a condition of any other form of right of residence, as inter alia Article 7 of Directive 2004/38 makes clear. In *Baumbast and R* the Baumbast family was self-sufficient, and although that was not expressly relied upon in the reasoning of the Court in its answers to questions one and two, as distinct from question three, nevertheless those were the facts of the case and it would be wrong in principle to derive any wider principle from it such as would validate Ms Ibrahim's claim given her lack of self-sufficiency.

15. According to the referring court, Ms Ibrahim claims that she is entitled to remain in the United Kingdom by reason of Article 12 of Regulation No 1612/68 taken together with the judgment of the Court in *Baumbast and R*. It was accepted that Article 12(3) of Directive 2004/38 does not assist Ms Ibrahim because of a lacuna found there on the particular facts relating to Mr Y, who had ceased to be a worker with a right of residence

4 — Case C-413/99 [2002] ECR I-7091.

in the United Kingdom before his departure (and had failed to obtain a new right of residence on his return). Ms Ibrahim considers however that in accordance with the judgments of the Court in *Echternach and Moritz* [5] and *Baumbast and R* [6] an implied right of residence is derived from Article 12 of Regulation No 1612/68. It is thus irrelevant that Articles 10 and 11 of Regulation No 1612/68 have been repealed by Directive 2004/38 as Article 12 of Regulation No 1612/68 has specifically not been repealed. This is particularly the case where the rights of Ms Ibrahim's children to education in the United Kingdom have already accrued, despite Mr Y's ceasing to work in the United Kingdom by the spring of 2004, even before the promulgation of Directive 2004/38 on 29 April 2004. There is no requirement of self-sufficiency in the case of a Union citizen who works in a host Member State. Moreover, there was no requirement of self-sufficiency in the Court's answers to questions one and two in *Baumbast and R*. This was emphasised by the fact that the Court did not think it necessary to answer the subsequent parts of question three (see *Baumbast and R* at paragraph 95).

16. The referring court considers that the factual situation in the present appeal is very different from the four cases encompassed by *Echternach and Moritz* and *Baumbast and R*. In the first decision, the student children were themselves adults. They had spent most of their lifetime in the host countries. In the second decision, the Baumbast family were continuing to reside in their home in the United Kingdom, and were stated to be self-sufficient. In *R*, the migrant worker was still working in the United Kingdom and thus plainly maintained his right of residence, and the only issue was that he had divorced. The referring court is uncertain whether in accordance with the *Baumbast and R* case there is an implied right of residence pursuant to Article 12 of Regulation No 1612/68 alone rather than a combination of Articles 10 and 12 of that regulation. Given that Article 10 of Regulation No 1612/68 has been repealed, and replaced by Article 7 of Directive 2004/38, it is not obvious to the referring court that the full rationale of *Baumbast and R* survives, and it is arguable that its modern rationale has to take its source from a combination of Article 12 of Regulation No 1612/68 taken together with Directive 2004/38. Moreover, the referring court considers that questions one and two in *Baumbast and R* were answered without reference to the principle of self-sufficiency. However, the answers given were against the background of the fact that the Baumbast family were self-sufficient. Article 12(3) of Directive 2004/38 does not appear to be expressly premissed on the condition of self-sufficiency, even though that principle is expressly mentioned in Article 12(2) dealing with death. However, there is a general principle of self-sufficiency outside the case of the worker.

17. It was in these circumstances that the Court of Appeal, by order dated 21 April 2008,

5 — Joined Cases 389/87 and 390/87 [1989] ECR 723.
6 — Cited in footnote 4.

referred the following questions to the Court for preliminary ruling:

'In circumstances where (i) a non-EU national spouse and her EU national children accompanied an EU national who came to the United Kingdom (ii) the EU national was in the United Kingdom as a worker (iii) the EU national then ceased to be a worker and subsequently left the United Kingdom (iv) the EU national, the non-EU national spouse and children are not self-sufficient and are dependent upon social assistance in the United Kingdom (v) the children commenced primary education in the United Kingdom shortly after their arrival there while the EU national was a worker:

(1) do the spouse and children only enjoy a right of residence in the United Kingdom if they satisfy the conditions set out in Directive 2004/38 …?;

or

(2) (i) do they 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 they have access to sufficient resources so as not to become a burden on the social assistance system of the host Member State during their proposed period of residence and have comprehensive sickness insurance cover in the host Member State?;

(3) if the answer to question 1 is yes, is the position different in circumstances such as the present case where the children commenced primary education and the EU-national worker ceased working prior to the date by which Directive 2004/38 … was to be implemented by the Member States?'

III — Proceedings before the Court

18. Written pleading were submitted by Ms Ibrahim, the United Kingdom, Ireland, the Italian Republic, the Commission and the

EFTA Surveillance Authority. A hearing was held on 2 September 2009 at which the Borough, Ms Ibrahim, the United Kingdom, the Kingdom of Denmark, Ireland, the Commission and the EFTA Surveillance Authority submitted observations.

IV — Legal assessment

19. The proceedings before the referring court concern Ms Ibrahim's entitlement to housing assistance in accordance with the provisions laid down by national legislation. Given that in accordance with national law that assistance is premissed, inter alia, on Ms Ibrahim's entitlement to reside in the United Kingdom, the questions before the Court centre on whether and if so under what conditions she and her children have a right to reside in that Member State pursuant to Community law. [7]

20. In my view, it is convenient to deal with the three questions raised by the referring court together. The referring court stated that it was sceptical as to whether Article 12 of Regulation No 1612/68 and the judgment of the Court in the *Baumbast and R* [8] case, in the light of Directive 2004/38, give the children [9] of a worker who has stopped working a right to reside in the host Member State to complete an education which has relatively recently begun and to do so despite lack of self-sufficiency, and however briefly the worker has resided as a worker in the host Member State.

21. It is apparent from the documents before the Court that Mr Y worked in the United Kingdom from October 2002 until May 2003 and claimed incapacity benefit there from June 2003 to March 2004. It would thus appear that Mr Y enjoyed the status of a worker pursuant to Article 39 EC. Despite the relatively short period in which Mr Y worked in the United Kingdom, his status as a Community worker during the relevant period has not been called into question by the referring court. Moreover, given that Mr Y would appear to have pursued an effective and genuine activity in the United Kingdom, albeit for a relatively limited period of time, there is no indication in the file before the Court, subject to verification by the referring court, that either he or his spouse attempted to improperly or fraudulently take advantage of the provisions of Community law. [10]

7 — On 21 April 2008, the date of the order for reference, it would appear that the referring court considered that Ms Ibrahim had no right to reside in the United Kingdom other than perhaps on the basis of Community law. At the hearing on 2 September 2009, counsel for the Borough and the United Kingdom indicated that Ms Ibrahim's legal situation may have changed in the meantime as her husband has resumed working in the United Kingdom. Given that the referring court has not amended or withdrawn its order for reference, in my view, it is necessary to proceed with the case in accordance with the facts as presented in that order.

8 — Cited in footnote 4.

9 — And their primary carer.

10 — See Case C-212/97 *Centros* [1999] ECR I-1459, paragraphs 24 and 25, and Joined Cases C-151/04 and C-152/04 *Nadin and Nadin-Lux* [2005] ECR I-11203, paragraphs 45 to 48.

22. It is clear from the file before the Court that during the period in which Mr Y was a worker, Ms Ibrahim and three of their children installed themselves with Mr Y in the United Kingdom. Two of the children started State education following their arrival and remain in such education. In the light of the circumstances outlined by the referring court, I consider that the children of a Union citizen who installed themselves in a host Member State while their parent had the status of a Community worker enjoy a clear right to continue their education in the United Kingdom pursuant to Article 12 of Regulation No 1612/68, a right which would be effectively negated if they lost their right of residence in that Member State due to the fact that their father subsequently ceased to be a Community worker. In my view, the loss of such right is not supported by Community legislation or by the case-law of the Court. In order to ensure the *effet utile* or effectiveness of the right of access to and enjoyment of education in the host Member State the children in question derive a right of residence directly from Article 12 of Regulation No 1612/68.

23. The Court stated in the *Baumbast and R* case that in order for the best possible conditions for the integration of the Community worker's family in the society of the host Member State to come about, a child of a Community worker must have the possibility of going to school and pursuing further education in the host Member State, as is expressly provided in Article 12 of Regulation No 1612/68, in order to be able to complete that education successfully. The Court noted in relation to the particular circumstances of Mr Baumbast's case that to prevent a child of a citizen of the Union, a citizen who according to the clear facts of the case in question was no longer at the relevant time a worker [11] pursuant to Community law, from continuing his education in the host Member State by refusing the child permission to remain might dissuade that citizen from exercising the rights to freedom of movement laid down in Article 39 EC and would therefore create an obstacle to the effective exercise of the freedom thus guaranteed by the EC Treaty. [12]

24. I consider that it is thus clear from the *Baumbast and R* case that Mr Baumbast's children derived a right of residence in the United Kingdom solely from Article 12 of Regulation No 1612/68 itself in order to continue general educational courses there, that right having vested once they installed themselves in the United Kingdom during the exercise by Mr Baumbast of rights of residence as a migrant worker. The right of residence of Mr Baumbast's children in order to pursue their education persisted irrespective of the fact that Mr Baumbast was no longer a Community worker.

11 — Moreover, the Court at paragraph 54 of the *Baumbast and R* case (cited in footnote 4) stressed that Article 12 of Regulation No 1612/68 provides a right of access to educational courses of 'the children of a national of a Member State *who is or has been employed* in the territory of another Member State' (emphasis added). See also *Echternach and Moritz*, cited in footnote 5, paragraph 21. Mr Moritz's father was no longer a worker in the host Member State as he had returned to the Member State of origin. See also Case 42/87 *Commission* v *Belgium* [1988] ECR 5445, where the Court found that the entitlement to equality of treatment continues to operate in favour of the children of a deceased migrant worker. See Article 12(3) of Directive 2004/38.

12 — See paragraphs 50 to 52 (case cited in footnote 4).

25. There is nothing in the text of the *Baumbast and R* case which would tend to indicate that the Court based the continued right of residence of Mr Baumbast's children on a combination of Article 10 (now repealed by Directive 2004/38) and Article 12 of Regulation No 1612/68.

26. While the Court did in fact refer in paragraphs 58 to 62 of the judgment in the *Baumbast and R* case to both provisions of Regulation No 1612/68, it is clear that that reference was made in the context of the particular circumstances relating to R's case. R's children were members of the family of a Community worker but they did not permanently live with that worker. The Court held that members of the family of a worker who is a national of one Member State and who is employed in the territory of another Member State have a right of residence and a right to pursue their education under Articles 10 and 12 of Regulation No 1612/68. [13] The Court however went on to state that in providing that a member of a migrant worker's family has the right to install himself with the worker, Article 10 of Regulation No 1612/68 does not require that the member of the family in question must live permanently with the worker. [14]

27. In that regard, I would stress that point 1 of the operative part of the judgment in the *Baumbast and R* case relating to the right of residence of both Mr Baumbast's and R's children is based solely on Article 12 of Regulation No 1612/68.

28. I would also note, as stated by the Court in the *Gaal* [15] case, that Article 12 of Regulation No 1612/68 does not make any reference to Article 10 of that regulation. In the *Gaal* case the national court sought to ascertain whether the definition of 'child' for the purposes of Article 12 of Regulation No 1612/68 is limited, as in Articles 10(1) and 11 of that regulation (now repealed), to children who are under 21 years of age or dependent. The Court considered that to make the application of Article 12 of Regulation No 1612/68 subject to an age-limit or to the status of dependent child would conflict with the letter and the spirit of that provision. [16]

29. Thus in order for the rights granted pursuant to Article 12 of Regulation No 1612/68 to vest, the children of a worker or former worker must install themselves in the host Member State during the exercise by their parent of rights of residence as a migrant worker in that Member State. [17] In that event, and provided the other conditions contained

13 — See paragraph 58 (case cited in footnote 4).
14 — See paragraph 62.

15 — C-7/94 [1995] ECR I-1031, paragraph 23.
16 — See paragraph 25.
17 — See Case 197/86 *Brown* [1988] ECR 3205, paragraph 30, and *Gaal*, cited in footnote 15, paragraph 27.

in Article 12 of Regulation No 1612/68 are fulfilled, the legal basis on which the child in question installed himself in the host Member State [18] and whether that legal basis continues to be applicable is of no further relevance. [19]

30. The contention that since its entry into force Directive 2004/38 is the sole source of rights of residence of citizens of the Union and their family members within the territory of the Member States should, in my view, be rejected.

31. The Community legislature when adopting Directive 2004/38 did not repeal Article 12 of Regulation No 1612/68, although Articles 10 and 11 of that regulation were expressly repealed with effect from 30 April 2006. [20] It would appear therefore that the clear intent of the Community legislature was to preserve the rights of access to and enjoyment of education by children of workers or former workers established by Article 12 of Regulation No 1612/68 as interpreted by the case-law of the Court.

32. In any event, in my view, there is no inherent incompatibility or conflict between the rights of residence granted under Article 12 of Regulation No 1612/68, as interpreted by the case-law of the Court, and those granted pursuant to Directive 2004/38 that could now require the Court to reinterpret Article 12 of Regulation No 1612/68 in a more restrictive fashion. The Community legislature, by adopting, inter alia, Article 12(3) of Directive 2004/38, [21] did not limit or alter the scope of Article 12 of Regulation No 1612/68, which deals specifically with the children of workers or former workers, but strengthened [22] the right of

18 — Be it for example Article 10 of Regulation No 1612/68 (now repealed).

19 — In her Opinion in Case C-302/02 *Laurin Effing* [2005] ECR I-553, Advocate General Kokott stated that '[s]ince Article 12 of Regulation No 1612/68 also benefits the children of former migrant workers, it does not matter whether the migrant worker is still in the host State or is still a worker at the time when the child seeks to rely on that article. Nor is it necessary that the conditions laid down in Article 10 should continue to be fulfilled. That provision defines which persons may live with the worker in the host State as members of his family. It requires in particular that the worker must provide for the maintenance of the persons concerned. *The rights under Article 12 of Regulation No 1612/68, however, are subject only to the condition that such a situation existed at some stage in the past. They are not dependent on the existence of that situation in the present. It is therefore sufficient that the child should have lived with his parents or either one of them in a Member State whilst at least one of his parents resided there as a worker*' (emphasis added). See point 58, internal citations have been excluded.

20 — See Article 38 of Directive 2004/38.

21 — Which expressly provides for the retention, in the event of death or departure of a Union citizen, of the right of residence by the children or 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. I would note that it would appear from the order for reference that Article 12(3) of Directive 2004/38 is not applicable to the particular circumstances of Ms Ibrahim's case.

22 — Through the retention of their right of residence in the host Member State.

children of other Union citizens to continue their education in the host Member State [23] in certain circumstances.

33. As regards the length of schooling in the United Kingdom of Ms Ibrahim's children I do not consider, in the light of the circumstances at hand, that it is a relevant factor when assessing their right to continue their education and their concomitant right of residence there. No conditions concerning minimum periods of enrolment are imposed by Article 12 of Regulation No 1612/68. Furthermore, in my view it would be incompatible with the consistent case-law of the Court to imply any such conditions as the Court, in cases such as *Gaal,* [24] *Baumbast and R,* [25] *di Leo* [26] and *Echternach and Moritz,* [27] has interpreted Article 12 of Regulation No 1612/68 in a broad rather than a restrictive manner. Moreover, the Court in the *Eind* case [28] restated its settled case-law to the effect that secondary Community legislation on movement and residence cannot be interpreted restrictively. In my view, if the children of a Union citizen who is a former Community worker were effectively prevented from continuing their education in the host Member State on the basis that they had not attended school there for some minimum duration, [29] this might dissuade that citizen from exercising the rights to freedom of movement laid down in Article 39 EC and would therefore create an obstacle to the effective exercise of that freedom. To borrow the words of the Court in paragraph 54 of *Baumbast and R,* [30] I consider that the imposition of such conditions would offend not only the letter but also the spirit of Article 12 of Regulation No 1612/68 and indeed Article 39 EC.

34. Given that Ms Ibrahim's children [31] have the right to reside in the host Member State in order to attend general educational courses pursuant to Article 12 of Regulation No 1612/68, in the light of the *Baumbast and R* case [32] that provision must be interpreted as entitling the parent who is the primary carer of those children, irrespective of his or her nationality, to reside with them in order to facilitate the exercise of that right. [33]

23 — This interpretation is borne out in my view by the terms of recital 3 in the preamble to Directive 2004/38. While that recital refers to the need to codify and review the existing Community instruments dealing separately with workers, self-employed persons, as well as students and other inactive persons, it is evident from that same recital that the clear purpose of that directive was to simplify and strengthen, rather than diminish, the right of free movement and residence of Union citizens. In the same spirit, the Court, in Case C-127/08 *Metock and Others* [2008] ECR I-6241, recently underscored that Union citizens cannot derive less rights from Directive 2004/38 than from the instruments of secondary legislation which it amends or repeals (see paragraph 59).

24 — Cited in footnote 15.

25 — Cited in footnote 4.

26 — C-308/89 [1990] ECR I-4185.

27 — Cited in footnote 5.

28 — C-291/05 [2007] ECR I-10719, paragraph 43.

29 — Yet to be established.

30 — Cited in footnote 4.

31 — Who installed themselves in the United Kingdom during the exercise by their father of rights of residence as a migrant worker in that Member State.

32 — See paragraph 75 (case cited in footnote 4).

33 — Thus the parent who is the primary carer must be in a position to reside with their child in the host Member State as a necessary corollary of the child's rights pursuant to Article 12 of Regulation No 1612/68. See, by analogy, Case C-200/02 *Zhu and Chen* [2004] ECR I-9925, paragraph 45.

35. Parents, who are the primary carers of children who enjoy rights pursuant to Article 12 of Regulation No 1612/68, are in fact in a rather tenuous position as they do not derive any right of residence directly from the provision in question. Nonetheless, such individuals, as the primary carers of the children in question, derive clear but indirect rights of residence from Article 12 of Regulation No 1612/68, as interpreted by the case-law of the Court, in order to guarantee the full effectiveness of the rights granted to their children pursuant Article 12 of Regulation No 1612/68. [34]

36. The question however has been raised by the referring court whether the right of residence of Ms Ibrahim and her children in the United Kingdom is subject to the condition that they have access to sufficient resources so as not to become a burden on the social assistance system of the host Member State during their proposed period of residence and have comprehensive sickness insurance cover in the host Member State.

37. In my view, no support for the imposition of a condition of self-sufficiency or having health insurance cover in the circumstances of the proceedings before the referring court can be found in Community legislation or the case-law of the Court.

38. The right to reside in the territory of the Member States is conferred directly on every citizen of the Union by Article 18(1) EC.

39. That right may however be subject to the limitations and conditions imposed by the Treaty and by the measures adopted for its implementation. [35] In that regard, the Community legislature has expressly imposed a requirement of having sickness insurance cover in respect of all risks in the host Member State and having sufficient resources to avoid becoming a burden on the social assistance system of the host Member State during their period of residence on certain Union citizens and their family members in certain circumstances. [36]

40. However, I would note for example that no such requirement is imposed on Union

34 — The grant of such a right of residence to the primary carer is mandated by the need to ensure respect for the fundamental right to family life. See Article 8 of the European Convention on Human Rights and Fundamental Freedoms.

35 — See to that effect *Eind*, cited in footnote 28, paragraph 28.

36 — See, inter alia Article 7(1)(b), 7(1)(c), 7(1)(d) and 7(2) of Directive 2004/38. See formerly Council Directive 90/364/EEC of 28 June 1990 on the right of residence (OJ 1990 L 180, p. 26), 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), and Council Directive 90/366/EEC of 28 June 1990 on the right of residence for students (OJ 1990 L 180, p. 30). See also *Zhu and Chen*, cited in footnote 33, in which the Court found that Article 18 EC and Directive 90/364 confer on a minor who is a national of a Member State, is covered by appropriate sickness insurance and is in the care of a parent who is a third-country national having sufficient resources for that minor not to become a burden on the public finances of the host Member State, a right to reside for an indefinite period in the host Member State. In such circumstances, those same provisions allow a parent who is that minor's primary carer to reside with the child in the host Member State.

citizens who are workers or self-employed persons in the host Member State or on family members accompanying or joining them. [37]

41. Given that the Community legislature has explicitly opted in specific cases to limit the rights of residence of certain Union citizens and their family members by imposing a requirement of self-sufficiency and having health insurance cover, I consider that the absence of such conditions or requirements with respect to other Union citizens and their family members represents a clear choice on behalf of the Community legislature not to impose them. [38] I therefore consider that the right of residence of Union citizens and their family members is not subject to conditions or limitations concerning self-sufficiency and having sickness insurance cover unless they are explicitly imposed by the Community legislature.

42. Moreover, while it may be possible to state that a distinction has been broadly drawn under Community law between Union citizens who are workers or self employed and their family members and those who are 'economically non-active' concerning rights of residence and the question of self-sufficiency and having health insurance cover, [39] it is worth stressing that the distinction in question is neither absolute [40] nor indefinite. [41]

43. Article 12 of Regulation No 1612/68, which has remained unaltered despite the adoption of Directive 2004/38, clearly does not impose on its beneficiaries any condition of self-sufficiency or requirement concerning sickness insurance cover.

44. Indeed, in *Echternach and Moritz* the Court held that the status of child of a Community worker within the meaning of Regulation No 1612/68 implies that such children must be eligible for study assistance from the State in order to make it possible for them to achieve integration in the society of the host country. That requirement applies a

37 — See for example Article 7(1)(a), 7(1)(d) and 7(2) of Directive 2004/38. See in particular Article 14(4) of Directive 2004/38. Prior to the adoption of Directive 2004/38, see for example Article 4 of 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, English Special Edition 1968(II), p. 485) which provided that Member States shall grant a right of residence in their territory to workers and their family members. Directive 68/360 was repealed by Directive 2004/38.

38 — Compare for example Article 12(2) and Article 12(3) of Directive 2004/38.

39 — See *Eind*, cited in footnote 28, paragraphs 28 to 30.

40 — See for example Article 14(3) of Directive 2004/38.

41 — See Article 16 of Directive 2004/38 which provides, inter alia, that Union citizens who have acquired the right of permanent residence are not subject to the conditions contained in Chapter III of that directive.

fortiori where the persons covered by the provisions of Community law in question are students who arrived in the host country even before the age at which they had to attend school. [42]

45. Thus, far from imposing certain financial requirements on the beneficiaries of the rights granted pursuant to Article 12 of Regulation No 1612/68, the Court held in *Echternach and Moritz* that assistance granted to cover the costs of students' education and maintenance is to be regarded as a social advantage to which the children of Community workers (and former workers) are entitled under the same conditions as apply to the host country's own nationals. [43]

46. Moreover, no requirement of self-sufficiency or having sickness insurance cover can be drawn from *Baumbast and R.*

47. The Court did not impose such conditions in respect of its findings in point 1 of the operative part of the judgment that the children of a former Community worker were entitled to reside in the host Member State in order to attend general educational courses there, pursuant to Article 12 of Regulation No 1612/68 or, in point 2 of the operative part, that the parent who is the primary carer of those children, irrespective of his nationality, may reside with them in order to facilitate the exercise of that right. [44] As regards the question of the right of residence of the Baumbast children and their primary carer, in my view, no importance was attached by the Court to the fact that the Baumbast family appeared, by coincidence, to have resources and health insurance.

48. The question of self-sufficiency and sickness insurance cover merely arose in that case in connection with Mr Baumbast's right of residence [45] and centred on whether a citizen of the European Union who no longer enjoys a right of residence as a migrant worker in the host Member State can, as a citizen of the European Union, enjoy there a right of residence by direct application of Article 18(1) EC. [46]

42 — See paragraph 35 (case cited in footnote 5).

43 — Idem; paragraph 36. In *di Leo* (cited in footnote 26) the Court held that Article 12 of Regulation No 1612/68 is not confined to education or training within the host Member State. Thus children coming within that provision are to be treated as nationals for the purposes of the award of educational grants, not only where the education or training is pursued in the host State but also where it is provided in a State of which those children are nationals. See also Case 9/74 *Casagrande* [1974] ECR 773, and Case 68/74 *Alaimo* [1975] ECR 109.

44 — No reference to such factors was made in paragraphs 47 to 63 or 68 to 75 of the judgment. Those paragraphs contain the findings of the Court on the first and second question.

45 — Rather than his children's and spouse's right of residence in the United Kingdom.

46 — The Court stated in relation to Mr Baumbast that the exercise of the right of residence of citizens of the Union can be subordinated to the legitimate interests of the Member States. Thus in accordance with Article 18(1) EC and in particular Article 1 of Directive 90/364, beneficiaries of the right of residence must not become an 'unreasonable' burden on the public finances of the host Member State. See paragraphs 86 to 90 (case cited in footnote 4).

V — Conclusion

49. In the light of the foregoing observations, I propose that the Court should answer as follows the questions referred by the Court of Appeal (England and Wales) (Civil Division) (United Kingdom):

The children of a citizen of the European Union who have installed themselves in a Member State during the exercise by their parent of rights of residence as a migrant worker in that Member State are entitled to reside there in order to attend general educational courses there, pursuant to Article 12 of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community.

Article 12 of Regulation No 1612/68, in the circumstances of the case at hand, must be interpreted as entitling the parent who is the primary carer of those children, irrespective of his or her nationality, to reside with them in order to facilitate the exercise of that right. The fact that the parent who is a citizen of the Union has ceased to be a migrant worker in the host Member State and subsequently left that Member State, the fact that the children and their primary carer are not self-sufficient and are dependent upon social assistance in the host Member State and the length of time the children have been enrolled in general educational courses in the host Member State are irrelevant in this regard.