OPINION OF ADVOCATE GENERAL BOT

delivered on 14 September 2011 [1]

1. These cases offer the Court the opportunity to clarify the conditions for acquiring the right of permanent residence that is set out in Article 16(1) of Directive 2004/38/EC. [2] That provision provides that citizens of the European Union 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.

2. In the respective main proceedings, the applicants, who are Polish nationals, arrived in Germany before the date of accession of the Republic of Poland to the European Union. In accordance with German national law, they all acquired a right of residence for humanitarian reasons. Their right of residence was regularly extended, for the same reasons.

3. With the entry into force of Directive 2004/38, the applicants in the main proceedings applied to the competent German authorities for a right of permanent residence, taking the view that they fulfil the acquisition conditions laid down in Article 16(1) of that directive.

4. The Bundesverwaltungsgericht (Federal Administrative Court) (Germany) therefore asks whether periods of residence in the territory of the host Member State on the basis only of national law, including those which took place before the accession of the Republic of Poland to the European Union, may be considered to be periods of legal residence under that provision and thus counted towards the calculation of the duration of the Union citizen's residence for the purposes of acquiring a right of permanent residence.

5. In this Opinion, I shall explain the reasons why I consider that Article 16(1) of Directive 2004/38 must be interpreted as meaning that periods of residence in the host Member State on the basis only of national law must be taken into account towards the calculation of the duration of the Union citizen's residence

1 — Original language: French.

2 — 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, and – corrigenda – OJ 2004 L 229, p. 35, OJ 2005 L 30, p. 27,OJ 2005 L 197, p. 34 and OJ 2007 L 204, p. 28).

for the purposes of acquiring a right of permanent residence in that Member State.

6. I also propose that the Court should rule that such periods of residence completed before the accession of the Union citizen's State of origin to the European Union should also be taken into account for the purposes of acquiring such a right.

I — Legal context

A — *Directive 2004/38*

7. Directive 2004/38 brings together and simplifies the European Union's legislation on the right of citizens to move and reside freely within the Union. It establishes a three-tier system, each tier corresponding to the duration of residence in the host Member State.

8. As regards the first tier, Article 6(1) of that directive provides that Union citizens are to have the right of residence on the territory of another Member State for a period of up to three months without any conditions or any formalities other than the requirement to hold a valid identity card or passport.

9. As for the second tier, which corresponds to a period of residence of over three months in the host Member State, the European Union legislature has made such residence subject to certain conditions.

10. Thus, Article 7(1)(a) to (d) of that directive states:

'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).'

11. As regards the third tier, Chapter IV of Directive 2004/38, undoubtedly one of the most innovative sections, introduces a right of permanent residence, which is not subject to the conditions of Article 7 of that directive, for Union citizens who have resided legally for a continuous period of five years in the host Member State. [3]

12. Finally, it should be added that, under Article 37 of Directive 2004/38, the provisions of that directive should not affect any laws, regulations or administrative provisions laid down by a Member State which would be more favourable to the persons covered by that directive.

B — *National law*

13. The Law on the Freedom of Movement of Union Citizens (Freizügigkeitsgesetz/EU) of 30 July 2004 [4] transposes the provisions of Directive 2004/38 into the German legal order. In particular, Article 2(1) FreizügG/EU provides that Union citizens who enjoy a right of free movement and their families are to have the right to enter and reside in Germany in accordance with the FreizügG/EU.

14. Under Article 2(2) FreizügG/EU, Union citizens who are not workers or self-employed persons under the conditions laid down in Article 4 FreizügG/EU (which states that Union citizens who are not workers or self-employed and their family members and partners who accompany the Union citizen

3 — Article 16(1) of the directive.

4 — BGBl. 2004 I, p. 1950, as amended by the law of 26 February 2008 (BGBl. 2008 I, p. 215, 'FreizügG/EU').

or join him are to enjoy the right under Article 2(1) FreizügG/EU if they have sufficient sickness insurance cover and sufficient resources) enjoy the right to free movement under Union law.

15. Moreover, Article 4a FreizügG/EU states that Union citizens, their family members and partners, who have resided legally for a continuous period of five years in federal territory, are to enjoy the right of entry and residence, irrespective of whether the conditions laid down in Article 2(2) FreizügG/EU continue to be fulfilled.

II — Facts in the main proceedings

A — *Case C-424/10*

16. Case C-424/10 concerns a Polish national, Mr Ziolkowski. He was born in Poland in 1977 and arrived in Germany in September 1989, with his mother and brother. He pursued, in particular, preparatory secondary vocational education. In 1994 he was granted a work permit with no limitation as to duration or any other condition. Mr Ziolkowski began but did not complete an apprenticeship. He then tried, unsuccessfully, to set up a cleaning business. Since entering Germany, he has been entitled to social security benefits.

17. The referring court states that between July 1991 and April 2006 Mr Ziolkowski was granted a residence document on humanitarian grounds.

18. In July 2005 Mr Ziolkowski requested the extension of his residence document or the issue of an European Union residence permit.

19. In October 2005 the Land Berlin granted him a residence permit on humanitarian grounds, valid until April 2006. It indicated that the permit would not be extended beyond that date if Mr Ziolkowski was still dependent on social security.

20. By decision of 22 March 2006, after Mr Ziolkowski made a new application, the Land Berlin refused to extend his residence permit on the ground that he did not fulfil the conditions laid down in the FreizügG/EU because he was not a worker and could not prove that he had sufficient own resources. Mr Ziolkowski was subsequently informed

that he would be expelled to Poland. He submitted an objection to that decision to the Land Berlin, which has not yet ruled.

21. Following an appeal lodged by Mr Ziolkowski, the Verwaltungsgericht (Administrative Court) granted his application for a right of permanent residence on the ground that Article 16 of Directive 2004/38 confers that right on Union citizens who have resided legally in the host Member State for five years, irrespective of whether they have sufficient resources.

22. The Land Berlin appealed against that decision before the Oberverwaltungsgericht Berlin-Brandenburg (Higher Administrative Court of the Länder of Berlin and Brandenburg), which, by an order of 28 April 2009, overturned the decision. According to that court, although it is true that Mr Ziolkowski has been resident for more than five years in federal territory, it remains the case that only a period of residence based on Union law may be considered legal and only those periods during which the Member State of origin was a member of the European Union may be taken into account.

23. Mr Ziolkowski appealed against that order on a point of law before the referring court and asks that he be granted a right of permanent residence.

B — *Case C-425/10*

24. Case C-425/10 also concerns a Polish national, Ms Szeja, who was born in 1960 and entered Germany in 1988, as well as her two children, who were born in Germany in 1994 and 1996. Their father lives separately, but has joint custody of the children with their mother.

25. Ms Szeja was granted a right of residence between May 1990 and October 2005 for humanitarian reasons. The two children were also granted residence documents corresponding to that of their mother.

26. In August 2005 Ms Szeja and her children requested the extension of their residence documents or the issue of a right of permanent residence under European Union law.

27. By decisions of 26 October 2005 the Land Berlin rejected those applications on the ground that Ms Szeja and her children were not in a position to support themselves and informed them that they would be expelled to Poland.

28. They lodged objections to those decisions, which were unsuccessful. They then brought an action before the Verwaltungsgericht for recognition of their right of permanent residence pursuant to Directive 2004/38. In January 2007 that court upheld

their applications, finding that Article 16 of that directive confers such a right of permanent residence on Union citizens who have resided legally in the host Member State for five years, irrespective of whether they have sufficient resources.

29. The Land Berlin appealed against that judgment before the Oberverwaltungsgericht Berlin-Brandenburg, which set aside the judgment by an order of 28 April 2009.

30. Ms Szeja and her children appealed against that order on a point of law before the Bundesverwaltungsgericht.

31. It should moreover be added that, following a petition initiated before the Berlin House of Representatives, in November 2006 Ms Szeja and her children were granted for humanitarian reasons temporary residence permits, which have since been extended every six months.

III — The questions referred

32. The Bundesverwaltungsgericht has doubts as to the interpretation that should be given to Article 16(1) of Directive 2004/38. It therefore decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is the first sentence of Article 16(1) of Directive 2004/38 … to be interpreted as conferring on Union citizens who have resided legally for more than five years on the basis only of national law in the territory of a Member State, but who did not during that period fulfil the conditions laid down in Article 7(1) of [that] directive …, a right of permanent residence in that Member State?

(2) Are periods of residence of Union citizens in the host Member State which took place before the accession of their Member State of origin to the … Union also to be counted towards the period of legal residence under Article 16(1) of Directive 2004/38 …?'

IV — My analysis

33. By its first question, the referring court asks, in essence, whether Article 16(1) of Directive 2004/38 must be interpreted as meaning that periods of residence in the host

Member State on the basis only of national law may be counted towards the calculation of the period of residence of the Union citizen for the purposes of acquiring a right of permanent residence.

34. By its second question, the referring court asks the Court of Justice, in essence, whether such periods of residence which took place before the accession of the Member State of origin of a Union citizen to the European Union must be counted towards that calculation for the purposes of acquiring that right.

A — *Taking account of periods of residence which took place on the basis only of the national law of the host Member State for the purposes of acquiring the right of permanent residence*

35. Article 7(1) of Directive 2004/38 provides that acquisition of the right of residence for more than three months is to be subject to the fulfilment of certain conditions. In order to enjoy that right, the Union citizen must, in particular, be a worker or self-employed person in the host Member State or have sufficient resources for himself and his family members not to become a burden on the social assistance system of that state and have comprehensive sickness insurance cover in that state.

36. The referring court asks whether, for the purposes of acquiring the right of permanent residence, the Union citizen must, during the five years of continuous residence preceding such acquisition, have fulfilled one of the conditions listed in Article 7(1) of Directive 2004/38 or whether it is sufficient that, during those years, his residence was legal under national law.

37. The German Government, Ireland, the Governments of Greece and the United Kingdom and the European Commission consider that a Union citizen may acquire a right of permanent residence only if he has resided continuously for five years in the host Member State and, during those five years, he fulfilled the conditions listed in Article 7(1) of Directive 2004/38. In other words, they consider that a Union citizen who does not fulfil those conditions may not be described as having 'resided legally' within the meaning of Article 16(1) of that directive.

38. Those Governments and the Commission put forward, in particular, the fact that Recital 17 in the preamble to that directive states that '[A] right of permanent residence should … be laid down for all Union citizens and their family members who have resided in the host Member State *in compliance with*

the conditions laid down in this Directive [5] during a continuous period of five years without becoming subject to an expulsion measure'. In their view, the expression 'in compliance with the conditions laid down in this Directive' refers to the conditions listed in Article 7(1) of the directive and demonstrates that they must have previously been fulfilled by the Union citizen before he can acquire a right of permanent residence.

39. I do not share that view.

40. The Court has previously had the opportunity to rule on the scope of Article 16(1) of the directive, and in particular on what should be understood by '*resided legally* [6] ... in the host Member State'.

41. In *Lassal*, [7] the Court held that continuous periods of five years' residence completed before the date of transposition of Directive 2004/38, in accordance with earlier European Union law instruments, must be taken into account for the purposes of the right of permanent residence.

42. More recently, in *Dias*, [8] the Court was asked whether periods of residence of a Union citizen in a host Member State completed on the basis solely of a residence permit validly issued under Directive 68/360/EEC, [9] although the holder of that permit does not satisfy the conditions governing entitlement to any right of residence, can be regarded as having been completed legally for the purposes of the acquisition of the right of permanent residence under Article 16(1) of Directive 2004/38.

43. In that case, the Court held that a period of residence in the host Member State on the basis solely of a residence permit validly issued under Union law without the conditions governing entitlement to any right of residence having been met by the Union citizen cannot be regarded as having been completed 'legally' and cannot therefore be taken into account for the purposes of the acquisition of a right of permanent residence. [10]

44. The Court explained that Ms Dias' residence permit was declaratory in nature and did not confer rights. [11] As that residence permit was not capable of conferring rights on its holder, in particular a right of residence, the Court held that periods completed solely on the basis of such a permit could not be taken

5 — Emphasis added.
6 — Emphasis added.
7 — Case C-162/09 [2010] ECR I-9217.
8 — Case C-325/09 [2011] ECR I-6387.
9 — Council Directive 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: Series I Chapter 1968(II) P. 0485).
10 — *Dias*, cited above, paragraph 55.
11 — Ibidem (paragraphs 48 to 52).

into account for the purposes of acquiring a right of permanent residence.

45. The abovementioned judgments in *Lassal* and *Dias* do not settle the question whether periods of residence completed solely on the basis of national law must be taken into account for the purposes of acquiring a right of permanent residence. In the present cases, it is undeniable that the residence was based on a right conferred by national law. The point of law at issue is whether the periods of residence lawfully completed in accordance with national law may be taken into account under Union law where it introduces new, common rules in place of those which previously existed, whether they were Union rules or national rules which did not conflict with previous Union law.

46. In that regard, I observe, in the first place, that Directive 2004/38 itself states, in Article 37, that the provisions it lays down are not to affect more favourable national provisions.

47. That is undoubtedly true of a right of residence granted for humanitarian reasons, with no account being taken of the level of the relevant person's resources.

48. It seems to me that it follows that since such wording is used, without any qualification that, none the less, those more favourable national provisions are to be excluded from the mechanism for acquiring the right of permanent residence, the fact is that Directive 2004/38 has – perhaps implicitly, but none the less necessarily – recognised their validity in respect of the mechanism in question.

49. What purpose would be served by Article 37 of that directive if the opposite solution were adopted? If that article exists, it is because it has a meaning, which must necessarily be in harmony with the purpose of that directive, as we shall presently see.

50. In the second place, as the Court pointed out in the *Lassal* judgment, having regard to the context and objectives of Directive 2004/38, the provisions of that directive cannot be interpreted restrictively, and must not in any event be deprived of their effectiveness. [12] There appears to be no doubt that the purpose of that directive, as expressed in particular in Recitals 3 and 17 of the preamble thereto, is to achieve a system focussing on strengthening social cohesion, in which the right of permanent residence appears as a key factor, being an element of the citizenship of the Union, a citizenship which should be the 'fundamental status of nationals of the Member States when they exercise their right of free movement and residence.' [13]

12 — Ibidem (paragraph 31).

13 — See Recital 3 in the preamble to Directive 2004/38.

51. It is the wish of the Union legislature that Union citizens who fulfil the conditions for the acquisition of that right of permanent residence should have in almost all respects equal treatment with nationals of the Member States. [14] That is based on the principle that, after a sufficiently long period of residence in the host Member State, the Union citizen has developed close links with that Member State and become an integral part of its society. [15]

52. The duration of the Union citizen's residence in the host Member State is an indication of a degree of integration into that state. The longer the period of residence in that state, the more the links with it are assumed to be close and the more the integration is likely to be complete, until it gives that citizen a feeling of being on the same footing as a national and of being an integral part of society in the host Member State. It cannot be disputed, from my point of view, that that is the situation which arises where the links between the individual and the host Member State are established in the context of humanitarian solidarity.

53. The Court has stated in the *Dias* judgment, that the integration objective which lies behind the acquisition of the right of permanent residence laid down in Article 16(1) of Directive 2004/38 is based not only on territorial and time factors but also on qualitative elements, relating to the level of integration in the host Member State. [16]

54. In my opinion, and as Advocate General Kokott noted in point 52 of her Opinion in the case which gave rise to the judgment in *McCarthy*, [17] the degree of integration of the Union citizen does not depend upon whether the source of his right of residence is in European Union law or national law.

55. I shall add that, in my view, that degree of integration also does not depend on the material circumstances of that citizen, that is whether they are secure or insecure, as those circumstances have been taken into account and managed by the host Member State for a period of time, the duration of which, being greater than the minimum duration required by Directive 2004/38, has constituted a specific demonstration of social cohesion.

56. If we take, by way of reference, the situation of a Union citizen, a French citizen for

14 — See Proposal 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, p. 3).

15 — Ibidem (p. 18).

16 — See paragraph 64.

17 — Case C-434/09 [2011] ECR I-3375.

example, who has obtained a right of permanent residence on the basis of European Union law, has lived on German territory since the age of 12, has established a family there and finds himself unemployed in circumstances identical to those in the present cases, I do not see how that citizen's integration would be more complete than that of Mr Ziolkowski, who also arrived on German territory at the age of 12, who undertook part of his education there and who today has a child of German nationality, or that of Ms Szeja, who has lived for over 20 years on that territory, where her children were born and have always lived.

57. We would be making a distinction between those citizens which would amount to holding that certain Union citizens are less so than others for the sole reason that they were admitted before their State of origin acceded to the European Union and even though their admission was for humanitarian reasons, which is a more favourable condition which Directive 2004/38 yet states that it is not to affect adversely. My assessment would clearly be quite different if the person in question were residing illegally on the territory of the host Member State, which is not so in the present cases.

58. Finally, at this stage, it seems to me appropriate to consider again Article 37 of Directive 2004/38. The directive has in fact created a new right of permanent residence that did not exist in the previous legal texts. It recasts the old system and replaces it by a single text with a view to creating a single body of rules, the purpose of which I have already pointed out. In doing so, Directive 2004/38 lays down the rules which Member States must accept and which, if complied with, will mean that they will be unable to oppose the granting of a right of permanent residence. At the same time, and bearing in mind the objective pursued by Article 37, which appears in Chapter VII on final provisions, the directive does not prevent those States from adopting more favourable rules which may accelerate the process of integration and social cohesion. It seems to me therefore that Article 37 has a meaning and serves a purpose, in the context of the analysis I propose, which are consistent with the objective of that directive.

59. Accordingly, in the light of all the above considerations, I am of the opinion that Article 16(1) of Directive 2004/38 must be interpreted as meaning that periods of residence in the host Member State on the basis only of national law must be taken into account in calculating the duration of the residence of the Union citizen for the purposes of acquiring a right of permanent residence in that Member State.

B — *Taking account of periods of residence before the accession of the Union citizen's State of origin to the European Union for the purposes of acquiring the right of permanent residence*

60. The referring court also wishes to know whether periods of residence of Union citizens which took place before the accession of their Member State of origin to the European Union are also to be counted towards the period of residence for the purposes of acquiring a right of permanent residence.

61. In *Lassal*, the Court indicated that the taking into account of periods of residence completed before the date of transposition of Directive 2004/38 does not give retroactive effect to Article 16 of that directive, but simply gives present effect to situations which arose before that date. [18]

62. The Court also pointed out, in that connection, that the provisions on citizenship of the Union are applicable as soon as they enter into force and therefore they must be applied to the present effects of situations arising previously. [19]

63. Moreover, this follows from the Report from the Commission to the European Parliament and the Council of 10 December 2008 on the application of Directive 2004/38. [20] It follows from points made in that report that periods of residence completed by Union citizens before the accession of their Member States of origin must be taken into account by the host Member State. [21] It should be recalled that, as more favourable national provisions are acknowledged by the directive itself not to be in conflict with it, there is no reason not to allow them to have their intended effects here.

64. I therefore consider that Article 16(1) of Directive 2004/38 must be interpreted as meaning that periods of residence completed in the host Member State on the basis only of national law and before the accession of the Union citizen's State of origin to the European Union must be taken into account in calculating the duration of residence of that citizen for the purposes of acquiring a right of permanent residence.

18 — Paragraph 38.

19 — Paragraph 39 and case-law cited. See also, to that effect, Case C-195/98 *Österreichischer Gewerkschaftsbund* [2000] ECR I-10497, in which the Court accepted that a Member State was obliged to take into account, in calculating the pay of contractual teachers and teaching assistants, periods of employment spent by such staff before the accession of the Republic of Austria to the European Union (paragraphs 52 to 56).

20 — COM(2008) 840 final.

21 — See p. 8.

V — Conclusion

65. In view of all the foregoing considerations, I propose that the Court give the following answers to the questions asked by the Bundesverwaltungsgericht:

Article 16(1) of 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 must be interpreted as meaning that:

— periods of residence completed in the host Member State on the basis only of national law must be taken into account in calculating the duration of residence of a citizen of the European Union for the purposes of acquiring a right of permanent residence in that Member State;

— such periods of residence completed before the accession of a Union citizen's State of origin to the European Union must also be taken into account in that calculation for the purposes of acquiring that right.