Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 24 October 2017[1]

Joined Cases C-316/16 and C-424/16

B
v
Land Baden-Württemberg
(Request for a preliminary ruling
from the Verwaltungsgerichtshof Baden-Württemberg (Higher Administrative Court, Baden-Württemberg, Germany))
and
Secretary of State for the Home Department
v
Franco Vomero

(Request for a preliminary ruling
from the Supreme Court of the United Kingdom)

(Reference for a preliminary ruling — Citizenship of the European Union — Right of Union citizens to move and reside within the territory of the European Union — Protection against expulsion — Residence in the host Member State for the 10 years preceding the expulsion decision — Union citizen with no ties to his Member State of origin — Interruption of continuity of residence by a period of imprisonment — Offence committed after 20 years' residence — Concept of 'the precise time when the question of expulsion arises')

I. Introduction

1. The request for a preliminary ruling in Case C-316/16 was submitted in proceedings between B, who was born in Greece in 1989 and has been living in Germany with his mother since 1993, and the Land Baden-Württemberg (Land of Baden-Württemberg, Germany). In 2009 B committed an offence of which he was convicted. The request for a preliminary ruling in Case C-424/16 arises in the context of proceedings between the Secretary of State for the Home Department and Mr Franco Vomero, an Italian citizen who has resided in the United Kingdom since 1985 and who was convicted of manslaughter in 2001.

1 Original language: French.

2. It is against that factual background that expulsion measures prompted by the criminal convictions for the offences mentioned above were ordered against the persons concerned, following their periods of imprisonment. In that regard, the national courts express serious doubts as to the applicability of Article 28(3)(a) of Directive 2004/38/EC,[2] under which persons who have resided in the host Member State for 'the previous 10 years' qualify for enhanced protection against expulsion. These requests for a preliminary ruling therefore afford the Court the opportunity to scrutinise the expression set out in Article 28(3)(a) of Directive 2004/38 and to develop its recent case-law relating to the provision in question.

II. Legal framework

A. European Union law

3. Article 7(1) of Directive 2004/38, that article being headed 'Right of residence for more than three months', provides '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 the requirements set out in that provision are met. Those requirements seek, in particular, to ensure that Union citizens do not become a burden on the social assistance system of the host Member State during their period of residence.

4. Article 16 of Directive 2004/38 appears in Chapter IV, headed 'Right of permanent residence', and states:

'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.'

5. Chapter VI of Directive 2004/38, headed 'Restrictions on the right of entry and the right of residence on grounds of public policy, public security or public health', provides, in Articles 27 and 28:

'Article 27

General principles

1. Subject to the provisions of this Chapter, Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends.

2 Directive 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), as amended by Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 (OJ 2011 L 141, p. 1, and corrigenda OJ 2004 L 229, p. 35, and OJ 2005 L 197, p. 34) ('Directive 2004/38').

2. Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures.

…

Article 28

Protection against expulsion

1. Before taking an expulsion decision on grounds of public policy or public security, the host Member State shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin.

2. The host Member State may not take an expulsion decision against Union citizens or their family members, irrespective of nationality, who have the right of permanent residence on its territory, except on serious grounds of public policy or public security.

3. An expulsion decision may not be taken against Union citizens, except if the decision is based on imperative grounds of public security, as defined by Member States, if they:

(a) have resided in the host Member State for the previous 10 years; or

(b) are a minor, except if the expulsion is necessary for the best interests of the child, as provided for in the United Nations Convention on the Rights of the Child of 20 November 1989.'

B. German law

6. Article 28 of Directive 2004/38 was transposed into German law by Paragraph 6 of the Gesetz über die allgemeine Freizügigkeit von Unionsbürgern — FreizügG/EU (Law on freedom of movement of Union citizens) of 30 July 2004 (BGBl. 2004 I, p. 1950). That paragraph, in the version in force since 28 August 2007, provides:

'1. … only on grounds of public policy, public security or public health (Articles 45(3) and 52(1) of the Treaty on the Functioning of the European Union) may the right laid down in Paragraph 2(1) be declared forfeit, a document attesting to a permanent right of residence be withdrawn, or a residence permit or permanent residence permit be revoked. Entry may also be refused on the grounds referred to in the first sentence. …

2. The existence of a criminal conviction shall not in itself constitute a sufficient ground for the adoption of the decisions or measures referred to in subparagraph 1. Only criminal convictions which have not yet been deleted from the central register may be taken into account, and only in so far as the circumstances on which they are based disclose personal conduct that constitutes a present threat to the requirements of public policy. There must be a genuine and sufficiently serious threat affecting a fundamental interest of society.

3. When a decision under subparagraph 1 is made, account must be taken in particular of how long the person concerned has resided in Germany, his age, his state of health, his family and economic situation, his social and cultural integration in Germany and the extent of his ties to his State of origin.

4. Once a right of permanent residence has been acquired, a determination under subparagraph 1 may be made only on serious grounds.

5. In the case of Union citizens and their family members who have resided in Federal territory for the previous 10 years, and in the case of minors, a determination under subparagraph 1 may be made only on imperative grounds of public security. This shall not apply to minors where the forfeiture of the right of residence is necessary in the best interests of the child. Imperative grounds of public security may exist only if the person concerned, after being convicted of one or more intentional offences, has been definitively sentenced to at least five years' imprisonment or youth custody or if, on the occasion of the most recent definitive conviction, a term of preventive detention was ordered, where the security of the Federal Republic of Germany is affected or the person concerned poses a terrorist risk.'

C. United Kingdom law

7. Articles 27 and 28 of Directive 2004/38 were transposed into the legal system of the United Kingdom by regulation 21 of the Immigration (European Economic Area) Regulations 2006 (SI 2006/1003).

III. Background to the disputes in the main proceedings

A. Case C-316/16, B

8. B was born in Greece in 1989. Following the separation of his parents, he travelled to Germany with his mother in 1993, when he was three years old. B's mother has worked in Germany since their arrival and holds both Greek and German nationality.

9. At the age of eight, B was taken to Greece for two months by his father, against the wishes of his mother. He returned to Germany only after the intervention of the Greek authorities.

10. Aside from that episode and brief holiday periods, B has resided continuously in Germany since 1993. This is also the case with regard to his mother and the other members of his family, including his grandparents, who have lived in Germany since 1989, and his aunt.

11. B attended kindergarten and school, and obtained a lower secondary school leaving certificate (*Hauptschulabschluss*). While he speaks fluent German, he is only able to make himself understood orally in Greek using a basic language register.

12. In its request, the national court points out that B has an antisocial personality disorder and has also suffered from attention deficit hyperactivity disorder (ADHD) since childhood. In consequence, he has undergone several courses of medical treatment and continues to take medication.

13. By order of 7 November 2012, issued by the Amtsgericht Pforzheim (Local Court, Pforzheim, Germany) in simplified criminal proceedings, B received a 90-day-rate fine, approximately EUR 3 000, for unlawful appropriation, extortion, attempted blackmail and intentional unlawful possession of a prohibited weapon.

14. On 10 April 2013 B held up an amusement arcade, armed with a gun loaded with rubber bullets, with the intention, in particular, of obtaining the money required to pay the fine.

15. By judgment of 9 December 2013, the Landgericht Karlsruhe (Regional Court, Karlsruhe, Germany) convicted B of aggravated extortion with use of force or threats, carrying a firearm intentionally and unlawfully, and intentional and unlawful possession of ammunition, and sentenced him to five years and eight months' imprisonment. That judgment became final on 1 May 2014.

16. B has been detained since 12 April 2013, except for the period between 15 May and 12 August 2013 during which his sentence was enforced in the form of day-rate fines.

17. By decision of 25 November 2014, the authority responsible for dealing with foreign nationals determined that B had lost his right of entry to and residence in Germany, basing its decision on the fact that the requirements for determining the loss of the right of entry and residence in accordance with Paragraph 6(5) of the Law on freedom of movement of Union citizens of 30 July 2004, in conjunction with Article 28(3)(a) of Directive 2004/38, were met. At the same time, a seven-year entry and residence ban was imposed on B with effect from his departure date from Germany.

18. B brought an action against the decision of 25 November 2014 before the Verwaltungsgericht Karlsruhe (Administrative Court, Karlsruhe, Germany), which set aside the contested decision by order of 10 September 2015.

19. The Land of Baden-Württemberg brought an appeal against that order before the referring court, the Verwaltungsgerichtshof Baden-Württemberg (Higher Administrative Court, Baden-Württemberg). In the proceedings before the referring court, the Land of Baden-Württemberg argues that the determination of the loss of the right of entry and residence is lawful, while B submits that the offence he committed does not fall within the scope of 'imperative grounds of public security' within the meaning of Article 28(3)(a) of Directive 2004/38 and that, since he has resided in Germany since the age of three and has no ties to Greece, he qualifies for enhanced protection against expulsion as provided for in that article.

20. The referring court takes the view that, in the present case, the act committed by B cannot be considered to be an imperative ground of public security within the meaning of Article 28(3)(a) of Directive 2004/38. Accordingly, if B were to qualify for protection under Article 28(3)(a) of the directive, he could not be expelled. The referring court expresses doubts, however, as to whether such protection can be granted to B, given that he has theoretically been in custody since 12 April 2013.

B. Case C-424/16, Vomero

21. Mr Vomero, the defendant in the main proceedings, is an Italian national born in 1957. He moved to the United Kingdom on 3 March 1985 with his wife, a British national. The couple married a few months after entering the United Kingdom, where Mr Vomero undertook some casual work and cared for their five children.

22. After the breakdown of the marriage in 1998, Mr Vomero left the marital home and moved into accommodation with Mr Edward Mitchell.

23. On 1 March 2001, Mr Vomero killed Mr Mitchell. He was convicted of manslaughter and sentenced to eight years' imprisonment in 2002. He was released in July 2006.

24. By decision of 23 March 2007, confirmed on 17 May 2007, the Secretary of State for the Home Department decided to expel Mr Vomero under the provisions of the Immigration (European Economic Area) Regulations 2006. He was detained until December 2007 with a view to expulsion.

25. Before being brought before the Supreme Court of the United Kingdom, the main proceedings were heard by the Upper Tribunal (Asylum and Immigration Chamber) (United Kingdom) and the Court of Appeal (United Kingdom). The proceedings were twice stayed pending delivery of the Court's judgments of 16 January 2014, *Onuekwere* (C-378/12, EU:C:2014:13), and of 16 January 2014, *G.* (C-400/12, EU:C:2014:9). In the intervening period, Mr Vomero committed and was convicted of further offences.

26. The referring court takes the view that Mr Vomero did not acquire a right of permanent residence before the decision to expel him. However, the court observes that Mr Vomero had resided in the United Kingdom since 3 March 1985, so that it can be assumed that he had resided in the host Member State 'for the previous 10 years' within the meaning of Article 28(3)(a) of Directive 2004/38. If so, Mr Vomero cannot be expelled unless the decision to expel him is based on imperative grounds of public security.

IV. Procedure and questions referred for a preliminary ruling

27. It is in those circumstances that the national courts referred their questions to the Court for a preliminary ruling in the two cases at issue.

28. In Case C-316/16, the Verwaltungsgerichtshof Baden-Württemberg (Higher Administrative Court, Baden-Württemberg) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is it a priori impossible for a conviction and subsequent enforcement of a custodial sentence to have the result that the integrative links of a Union citizen who entered the host Member State at the age of three must be considered to be broken, with the consequence that there is no continuous period of residence of 10 years, for the purposes of Article 28(3)(a) of Directive 2004/38, and therefore that there is no requirement to grant him protection against expulsion under Article 28(3)(a) of Directive 2004/38, if that Union citizen has, since entering the host Member State at the age of three, spent his entire life there and no longer has any ties to the Member State of his nationality, and if the offence that resulted in conviction and enforcement of a custodial sentence was committed after he had been resident for 20 years?

(2) If the answer to Question 1 is in the negative: With regard to the question of whether enforcement of a custodial sentence leads to the breaking of integrative links, must the custodial sentence imposed in respect of the offence giving rise to the expulsion be disregarded?

(3) If the answers to Question 1 and Question 2 are in the negative: What criteria are to be used to determine whether the Union citizen affected in such a case nevertheless qualifies for protection against expulsion under Article 28(3)(a) of Directive 2004/38?

(4) If the answers to Question 1 and Question 2 are in the negative: Are there mandatory provisions of EU law for determining "the precise time when the question of expulsion arises" and the point in time at which an overall assessment must be made of the affected Union citizen's situation in order to establish the extent to which the non-continuous nature of the period of residence in the 10 years preceding the decision to expel the person concerned prevents him from qualifying for enhanced protection against expulsion?'

29. In Case C-424/16, the Supreme Court of the United Kingdom submits the following questions to the Court for a preliminary ruling:

'(1) whether enhanced protection under [Article 28(3)(a) of Directive 2004/38] depends upon the possession of a right of permanent residence within Article 16 and [Article 28(2) of that directive].

If the answer to question one is in the negative, the following questions are also referred:

(2) whether the period of residence for the previous 10 years, to which [Article 28(3)(a) of Directive 2004/38] refers, is

(a) a simple calendar period looking back from the relevant date (here that of the decision to deport), *including* in it any periods of absence or imprisonment,

(b) a potentially non-continuous period, derived by looking back from the relevant date and adding together period(s) when the relevant person was not absent or in prison, to arrive, if possible at a total of 10 years' previous residence.

(3) what the true relationship is between the 10 year residence test to which [Article 28(3)(a) of Directive 2004/38] refers and the overall assessment of an integrative link.'

30. The German and United Kingdom Governments and the European Commission submitted written observations in Case C-316/16. Mr Vomero, the United Kingdom Government as well as the Danish Government, Ireland, the Greek and Dutch Governments and the Commission submitted written observations in Case C-424/16. The two cases were joined for the purpose of the oral part of the procedure. The parties that submitted observations during the written part of the procedure were also present at the hearing held on 17 July 2017, with the exception of the Greek and Dutch Governments.

V. Assessment

A. The first question referred in Case C-424/16: is the possession of a right of permanent residence a prerequisite of qualification for enhanced protection under Article 28(3)(a) of Directive 2004/38 ?

1. Preliminary observations

31. By the first question referred for a preliminary ruling in Case C-424/16, the national court essentially asks whether, before qualifying for protection against expulsion under Article 28(3) of Directive 2004/38, a Union citizen must necessarily have acquired a right of permanent residence in accordance with the detailed rules laid down in Article 16 of that directive, which, in turn, ensures protection against expulsion as provided for in Article 28(2) of the directive.

32. I note that this question arises only in Case C-424/16, where the national court has stated that Mr Vomero has not acquired any right of permanent residence, which is a matter for that court to determine before taking a final decision with due regard to EU law as interpreted by the Court. According to the national court, that finding is based on the fact that Mr Vomero was in prison between 2001 and 2006, as well as the approach taken by the Court in its case-law, particularly in

Dias[3] and *Onuekwere*.[4]

33. However, it must be noted that, in the case of citizens of third States who fulfil the condition of minimum presence on the employment market of a Member State, namely citizens whose rights are based on Decision No 1/80 of the Association Council of 19 September 1980 on the development of the Association between the European Economic Community and Turkey, the Court has held that their right of residence, as the corollary of the right to have access to the employment market, is not affected by imprisonment.[5] In taking that approach, the Court referred to the wording of the provisions of that decision, which does not permit any limitation on the right of residence except in the event of absence or on grounds of public policy, public security or public health.[6] However, in *Dias*,[7] the Court held that a similar provision of Directive 2004/38, namely Article 16(4), may be applied by analogy to periods prior to those covered by Directive 2004/38 which do not amount to legal residence for the purpose of Article 16(1) of that directive.[8] In *Dias*,[9] the Court sought above all to address a lacuna in Directive 2004/38 and a situation which could arise only prior to that directive.[10] The case-law cited above concerns the effect of imprisonment on the enjoyment of rights acquired after presence on the employment market for a number of years, while *Onuekwere*[11] relates to the stage at which a right is acquired. Consequently, the main reason stated by the Court in *Onuekwere*,[12] according to which the taking into consideration of periods of imprisonment for the purpose of acquiring a right of permanent residence would be contrary to the aim pursued by Directive 2004/38, cannot be applied to the case of forfeiture of that right because, in some cases, it may involve a Union citizen taking advantage not of periods of imprisonment directly, but of earlier periods of residence in the Member State.

34. As regards the question whether the acquisition of a right of permanent residence is a precondition for the grant of enhanced protection under Article 28(3)(a) of Directive 2004/38, the national court put forward two distinct positions, as the members of the court were unable to reach unanimity on the first question referred. That difference of opinion also characterises the positions of the parties.

35. Under the first of those positions, which is essentially supported by the Ireland, the Greek, Dutch and United Kingdom Governments as well as the Commission, protection against expulsion is granted to citizens in progressive stages. Therefore, the acquisition of a right of permanent residence — with the advantages flowing from Article 28(2) of that directive — is a prerequisite for the enjoyment of enhanced protection under Article 28(3)(a) of Directive 2004/38.

36. The second position, which is that favoured by Mr Vomero and the Danish Government, is based on the premiss that Article 28(2) and (3) of Directive 2004/38 lay down two distinct sets of rules on protection against expulsion. Consequently, a Union citizen does not necessarily have to qualify for the protection flowing from the right of permanent residence under Article 28(2) of Directive 2004/38 in order to claim protection against expulsion under Article 28(3) of that directive.

3 Judgment of 21 July 2011 (C-325/09, EU:C:2011:498, paragraph 57).

4 Judgment of 16 January 2014 (C-378/12, EU:C:2014:13, paragraph 26).

5 See judgments of 11 November 2004, *Cetinkaya* (C-467/02, EU:C:2004:708, paragraphs 38 and 39), and of 7 July 2005, *Aydinli* (C-373/03, EU:C:2005:434, paragraph 32). In the context of pre-trial detention followed by a criminal sentence of suspended imprisonment, also see judgment of 10 February 2000, *Nazli* (C-340/97, EU:C:2000:77, paragraphs 40 and 41).

6 Judgments of 11 November 2004, *Cetinkaya* (C-467/02, EU:C:2004:708, paragraph 38), and of 7 July 2005, *Aydinli* (C-373/03, EU:C:2005:434, paragraph 28).

7 Judgment of 21 July 2011 (C-325/09, EU:C:2011:498, paragraph 64).

8 Judgment of 21 July 2011, *Dias* (C-325/09, EU:C:2011:498, paragraph 65).

9 Judgment of 21 July 2011 (C-325/09, EU:C:2011:498).

10 See, to that effect, Opinion of Advocate General Trstenjak in *Dias* (C-325/09, EU:C:2011:86, point 102).

11 Judgment of 16 January 2014 (C-378/12, EU:C:2014:13).

12 Judgment of 16 January 2014 (C-378/12, EU:C:2014:13, paragraph 26).

2. The progressive nature of the levels of protection against expulsion in the context of Directive 2004/38

37. The position that the acquisition of a right of permanent residence is a prerequisite of qualification for enhanced protection under Article 28(3)(a) of Directive 2004/38 forms part of the wider notion of a progressive system of protection.

38. Directive 2004/38 takes that approach particularly with respect to the seriousness of the threat to public security, which justifies restrictions on the right of freedom of movement and residence.

39. First, under Article 28(1) of Directive 2004/38, a Union citizen may not, in principle, be expelled from the host Member State except on 'grounds of public policy or public security'. Next, Article 28(2) of Directive 2004/38 provides that a Union citizen with a right of permanent residence may not be expelled from the host Member State except on 'serious grounds of public policy or public security'. Last, under Article 28(3)(a) of Directive 2004/38, an expulsion decision may not be taken against a citizen who has resided in the host Member State for the previous 10 years unless the decision is based on 'imperative grounds of public security'. The Court has previously held that this last concept is considerably narrower than the concept of 'serious grounds' within the meaning of Article 28(2).[13]

40. It follows that Article 28(3)(a) of Directive 2004/38 ensures a higher level of protection against expulsion than that provided for in Article 28(2) thereof, which, in turn, provides a higher level of protection than that provided for in Article 28(1) of that directive.

3. Are the levels of protection against expulsion proportionate to the degree of integration in the host Member State?

41. As explained above, the level of protection against expulsion is inherently gradual within the system established by Directive 2004/38. However, in Case C-424/16, the referring court does not question the progressive level of protection against expulsion, but enquires whether the conditions for qualifying for each level of protection are organised in a sequential manner.

42. The degree of integration of a Union citizen in the host Member State is a key aspect of the system of protection against expulsion laid down in Directive 2004/38, since the level of that protection is proportionate to the extent of the Union citizen's integration in that Member State. The existence of such a relationship is flagged up in recital 23 of Directive 2004/38, which states that the scope of measures for the expulsion of Union citizens should be limited in accordance with the principle of proportionality to take account of a number of factors, including 'the degree of integration of the persons concerned'. That approach is borne out by recital 24 of the directive, which states that 'the greater the degree of integration of Union citizens and their family members in the host Member State, the greater the degree of protection against expulsion should be'.

43. Moreover, in Articles 16(1) and 28(3)(a) of Directive 2004/38, the legislature decided to introduce criteria for determining the degree of integration in the host Member State according to the length of residence there. 'Legal' residence of five years in the host Member State confers entitlement to a right of permanent residence which is accompanied by protection against any expulsion decision under Article 28(2) of Directive 2004/38, while, pursuant to Article 28(3) of that directive, residence 'for the previous 10 years' confers even higher protection.

13 See, to that effect, judgment of 23 November 2010, *Tsakouridis* (C-145/09, EU:C:2010:708, paragraph 40).

44. Furthermore, Article 16(3) of Directive 2004/38 states that, in principle, continuity of residence prior to the acquisition of a right of permanent residence is not affected by temporary absences not exceeding a total of six months per year, or by absences of a longer duration where justified for reasons set out in that provision. In addition, according to Article 16(4) of Directive 2004/38, the right of permanent residence is lost only through absence from the host Member State for a period exceeding two consecutive years.

45. It is settled case-law that the conditions for and detailed rules on the acquisition and loss of a right of residence under Article 16 of Directive 2004/38 may not be transposed without distinction to Article 28(3)(a) of that directive.

46. First, the Court has previously held that a period of imprisonment interrupts the continuity of the legal residence necessary in order to acquire a right of permanent residence within the meaning of Article 16(1) of Directive 2004/38,[14] whereas, with respect to the residence period of 10 years referred to in Article 28(3)(a) of that directive, the Court ruled in *G.*[15] that imprisonment may interrupt continuity of residence only 'in principle'.[16]

47. Second, in *Tsakouridis*,[17] the Court was asked about the possibility of applying by analogy the conditions relating to the loss of the right of residence, set out in Article 16(4) of Directive 2004/38, with a view to determining to what extent absences from the host Member State during the previous 10 years prevented the acquisition of enhanced protection under Article 28(3) of that directive. The Court ruled against that approach and stated that the national authorities are required to conduct an overall assessment in order to determine whether the integrative links previously forged with the host Member State have been broken.[18]

48. The case-law cited above is reflected in the written observations of the Commission, which offered a number of hypothetical situations in which an individual who has been present in the host Member State for 10 years has not acquired any right of permanent residence. The first situation contemplated by the Commission, which follows the reasoning adopted by the Court in *Tsakouridis*,[19] involves a person who has lawfully resided in the host Member State for at least 10 years, who, after working for 4 years in the host Member State, returned to his Member State of origin for 7 months, following which he came back to work in the host Member State for 3 years; after returning again to his Member State of origin, he came back to the host Member State where he resumed work. The second situation contemplated by the Commission is similar to that in *G.*[20] and involves a person who has resided in the host Member State for at least 10 years and has worked there for the entire period, punctuated by short periods of imprisonment.

49. However, I note that in *Tsakouridis* and *G.*, the persons concerned had not lost their right of permanent residence.[21] Accordingly, in answering the questions referred for a preliminary ruling in those two cases, the Court started from the premiss that enjoyment of the protection provided for in Article 28(2) of Directive 2004/38 was not in issue.

14 Judgment of 16 January 2014, *Onuekwere* (C-378/12, EU:C:2014:13, paragraph 31).

15 Judgment of 16 January 2014 (C-400/12, EU:C:2014:9).

16 Judgment of 16 January 2014, *G.* (C-400/12, EU:C:2014:9, paragraph 36).

17 Judgment of 23 November 2010 (C-145/09, EU:C:2010:708).

18 Judgment of 23 November 2010, *Tsakouridis*, (C-145/09, EU:C:2010:708, paragraphs 30 to 32). On the differences between the conditions for the grant and loss of a right of permanent residence and the conditions relating to enhanced protection against expulsion in terms of Article 28(3)(a) of Directive 2004/38, also see the Opinion of Advocate General Bot in *Onuekwere* (C-378/12, EU:C:2013:640, point 28).

19 Judgment of 23 November 2010 (C-145/09, EU:C:2010:708).

20 Judgment of 16 January 2014 (C-400/12, EU:C:2014:9).

21 Judgments of 23 November 2010, *Tsakouridis* (C-145/09, EU:C:2010:708, paragraphs 19 and 37), and of 16 January 2014, *G.* (C-400/12, EU:C:2014:9, paragraph 36).

50. Furthermore, in *Tsakouridis*,[22] the Court did not expressly state that only absences from the host Member State that were longer than those specified in Article 16(4) of Directive 2004/38 were capable of interrupting the continuity of the previous 10 years' residence for the purposes of Article 28(3)(a) of that directive, so that a person targeted by an expulsion measure could qualify for enhanced protection under that provision while at the same time be deprived of a right of permanent residence. An analysis of that judgment suggests that the Court rather had the opposite situation in mind. According to the statement of facts provided by the national court, Mr Panagiotis Tsakouridis left the host Member State only twice, once for a period of approximately six and a half months and again for slightly more than 16 months. Furthermore, in its judgment in *Tsakouridis*,[23] the Court stated that if 'it were concluded that a person in Mr Tsakouridis's situation who has acquired a right of permanent residence in the host Member State does not satisfy the residence condition laid down in Article 28(3) of Directive 2004/38, an expulsion measure could in an appropriate case be justified on "serious grounds of public policy or public security" as laid down in Article 28(2) of Directive 2004/38'.

51. Moreover, it is not apparent from Directive 2004/38, particularly Articles 14(2) and 7(1) thereof read together, that the right to reside legally in another Member State for more than three months may be restricted depending on the acquisition of a right of permanent residence. Thus, it is possible to reside legally in a non-continuous manner in a Member State for a period exceeding 10 years and not acquire a right of permanent residence. However, that possibility should not necessarily result in the grant of protection against expulsion provided for in Article 28(3)(a) of Directive 2004/38.

52. The Court has previously held in *Lassal*[24] that the acquisition of a right of permanent residence is subject to integration in the host Member State. In that connection, in *Dias*[25] and *Onuekwere*,[26] the Court also stated that the degree of integration of a Union citizen in the host Member State is based not only on territorial and temporal factors, but also on qualitative factors.

53. I am mindful of the fact that the considerations of the Court in those three judgments relate primarily to the acquisition of a right of permanent residence under Article 16(1) of Directive 2004/38. Those judgments do not concern, at least not directly, the period of residence of 10 years laid down in Article 28(3)(a) of that directive. However, I think that the Court's considerations go beyond the scope of Article 16 of Directive 2004/38. As stated above in point 42 of this Opinion, the degree of integration plays a role in the system of protection against expulsion established by Article 28 of Directive 2004/38.

54. In the light of those considerations, it seems to me that the grant of protection against expulsion, as provided for in Article 28(2) of Directive 2004/38, as well as enhanced protection, under Article 28(3)(a) thereof, is dependent on the required degree of integration. The only difference between those two provisions lies in the degree of integration necessary for the grant of a given level of protection, that level of protection being the combined result of the same factors. Consequently, it is not possible to qualify for the higher level of protection without first reaching the degree of integration necessary in order to qualify for the lower level of protection.

4. The coherence argument as regards the sequential nature of the levels of protection against expulsion in Directive 2004/38

55. What can be learned from an overall analysis of Directive 2004/38 supports the position that I have set out above.

22 Judgment of 23 November 2010 (C-145/09, EU:C:2010:708).

23 Judgment of 23 November 2010 (C-145/09, EU:C:2010:708, paragraph 37).

24 See judgment of 7 October 2010 (C-162/09, EU:C:2010:592, paragraph 37).

25 Judgment of 21 July 2011 (C-325/09, EU:C:2011:498, paragraph 64).

26 Judgment of 16 January 2014 (C-378/12, EU:C:2014:13, paragraph 25).

56. Within the framework of the system established by Directive 2004/38, protection against expulsion under Article 28(2) of that directive is one of the advantages flowing from enjoyment of a right of permanent residence.[27] The effects of acquiring a right of permanent residence on the legal situation of a citizen of another Member State present in the host Member State include, as a general rule, unconditional access to certain types of financial assistance,[28] and the conditions that have to be met in order to reside there legally are less stringent. Specifically, it is stated in Article 16(1) of Directive 2004/38 that the right of permanent residence is not to be subject to the conditions set out in Chapter III of that directive. It should be recalled that those conditions seek, in particular, to ensure that Union citizens do not become a burden on the social assistance system of the host Member State during their period of residence. It follows from the provisions concerned that the holder of a right of permanent residence might constitute a burden on the social assistance system of the host Member State without it being possible to remove him from the territory of that Member State.[29]

57. It is against that background that the argument that the possession of a right of permanent residence is not a prerequisite of qualification for the protection against expulsion provided for in Article 28(3)(a) of Directive 2004/38 has paradoxical consequences. If that were the case, a Union citizen could not be expelled unless there were imperative grounds of public security and, at the same time, he could be expelled if he were to become an unreasonable burden on the social assistance system of the host Member State, a situation which would render the system of protection against expulsion under Directive 2004/38 plainly incoherent.

58. It is true that, according to recital 16 of Directive 2004/38, in order to determine whether a person receiving social assistance is an unreasonable burden on its social assistance system, the host Member State must 'take into account the duration of residence' as well as 'the personal circumstances' of the person concerned before adopting an expulsion measure. Furthermore, a finding that a Union citizen is an unreasonable burden on the social assistance system of the host Member State, entailing the loss of his right of residence, must be preceded by a careful review that takes account of a range of factors in the light of the principle of proportionality.[30] However, those measures to ensure compliance with the principle of proportionality are not equivalent to the right of permanent residence which — on the basis of Article 16(1) of Directive 2004/38 — automatically excludes the possibility of a person being expelled from the host Member State for reasons relating to the functioning of the social assistance system.

59. In the light of the foregoing considerations, I propose that the Court answer the first question referred for a preliminary ruling in Case C-424/16 as follows: the acquisition of a right of permanent residence under Articles 16 and 28(2) of Directive 2004/38 is a prerequisite of qualification for enhanced protection under Article 28(3)(a) of that directive.

27 Dollat, P., *La citoyenneté européenne. Théorie et statuts*, Bruylant, Brussels, 2008, p. 278.

28 See Article 24(2) of Directive 2004/38.

29 Lenaerts, K., 'European Union Citizenship, National Welfare Systems and Social Solidarity', *Jurisprudence*, No 18, 2011, p. 409.

30 Judgment of 19 September 2013, *Brey* (C-140/12, EU:C:2013:565, paragraphs 69 to 75).

B. The second and third questions referred in Case C-424/16: the method for calculating 'the previous 10 years', within the meaning of Article 28(3)(a) of Directive 2004/38

1. Preliminary observations

60. By the second question referred for a preliminary ruling in Case C-424/16, in the event of the first question being answered in the negative, the national court asks the Court to rule on the interpretation of the expression 'the previous 10 years' appearing in Article 28(3)(a) of Directive 2004/38. It seems to me that, by this question, the national court essentially seeks to ascertain whether periods of absence and imprisonment may be regarded as periods of residence for the purpose of calculating the previous 10 years, within the meaning of Article 28(3)(a) of Directive 2004/38.

61. In addition, by the third question referred in Case C-424/16, the national court enquires about the precise relationship between the 10-year period mentioned in Article 28(3)(a) of Directive 2004/38 and the overall assessment of an integrative link.

62. By raising the concept of the overall assessment of an integrative link in its third question, the national court appears to draw attention to an inconsistency between the test of 'the previous 10 years' set out in Article 28(3)(a) of Directive 2004/38, which is specific and precise, and the 'overall assessment of an integrative link', which is a far more nebulous legal concept. Since that overall assessment is conducted where 'the previous 10 years' within the meaning of Article 28(3)(a) of Directive 2004/38 is punctuated by periods of absence or imprisonment, it is necessary to examine the second and third questions together.

2. The nature of 'the previous 10 years' within the meaning of Article 28(3)(a) of Directive 2004/38

63. First, I note that the Court has previously had occasion to interpret the expression 'the previous 10 years' appearing in Article 28(3)(a) of Directive 2004/38 in *G.*[31] In that judgment, the Court stated that the calculation carried out under that provision is different from the calculation to be made for the purpose of granting a right of permanent residence because the period concerned '*must, in principle, be continuous* and must be calculated by counting back from the date of the decision ordering the expulsion of the person concerned'.[32]

64. It follows that, unlike the right of permanent residence, protection against expulsion under Article 28(3)(a) of Directive 2004/38 is not a right which, once acquired, produces lasting effects that are independent of the question of expulsion and comparable to those described in point 56 of this Opinion. That protection is granted subject to the condition that a person has resided in the host Member State for a period of 10 years that is in principle continuous, to be determined each time the question of expulsion arises.

3. Inclusion of periods of absence in the calculation of 'the previous 10 years' within the meaning of Article 28(3)(a) of Directive 2004/38

65. The Court has construed the wording of Article 28(3)(a) of Directive 2004/38 to mean that 'the previous 10 years' must, in principle, be continuous.

31 Judgment of 16 January 2014 (C-400/12, EU:C:2014:9).

32 Judgment of 16 January 2014, *G.* (C-400/12, EU:C:2014:9, paragraphs 28 and 37). Emphasis added.

66. However, as Advocate General Bot observed in his Opinion in *Tsakouridis*,[33] it is impossible to impose a complete prohibition on absences on Union citizens, since it would be contrary to the objective of the free movement of persons pursued by Directive 2004/38 to deter Union citizens from exercising their freedom of movement on the ground that a mere absence from the host Member State may affect their right to enhanced protection against expulsion.

67. In the same vein, the Court stated in *Tsakouridis*[34] that, for the purpose of determining the extent to which absences from the host Member State prevent the person concerned from enjoying enhanced protection under Article 28(3)(a) of Directive 2004/38, the authorities of the host Member State are bound to take all the relevant factors into consideration in each individual case, in particular the duration of each period of absence from the host Member State, the cumulative duration and the frequency of those absences, as well as the reasons why the person concerned left the host Member State. According to the Court, it must be ascertained whether those absences involve the transfer to another State of the centre of the personal, family or occupational interests of the person concerned.[35] That position is based on the notion that such a transfer indicates that the links with the host Member State have been broken.[36] Consequently, an insignificant degree of integration does not warrant a finding that the continuity of the 10 years' residence for the purpose of Article 28(3)(a) of Directive 2004/38 was maintained, with the result that the person concerned can qualify for enhanced protection against expulsion.

68. It seems to me that the concept of an overall assessment, carried out only when the question arises, in the context of an expulsion process, of the continuity of residence during the previous 10 years, was introduced by the Court in order to ensure that the protection flowing from Article 28(3)(a) of Directive 2004/38 is not illusory or totally ineffective as a result of an unrealistic requirement, namely the unconditional continuity of presence in the host Member State during the previous 10 years for the purposes of Article 28(3)(a) of Directive 2004/38. My view is that the reference to an integrative link permits a flexible interpretation of the wording of that provision in order to ensure genuine enjoyment of freedom of movement.

69. Thus, where there are periods of absence from the host Member State, it is necessary — in order to determine the extent to which those periods interrupt the person concerned's residence and prevent him qualifying for enhanced protection under Article 28(3)(a) of Directive 2004/38 — to conduct an overall assessment of his integrative links in the host Member State.

4. Inclusion of periods of imprisonment in the calculation of 'the previous 10 years' within the meaning of Article 28(3)(a) of Directive 2004/38

(a) Effect of periods of imprisonment on the grant of enhanced protection under Article 28(3)(a) of Directive 2004/38 in the light of Onuekwere *and* G.

70. According to the Court, the imposition of a prison sentence by a national court is such as to demonstrate that the person concerned has failed to comply with the values expressed by the society of the host Member State in its criminal law.[37] Further, such non-compliance is, in turn, the reason why periods of imprisonment, first, should not be taken into account either for the purpose of acquiring a right of permanent residence[38] or for the purpose of granting enhanced protection under

33 C-145/09, EU:C:2010:322, point 122.

34 Judgment of 23 November 2010 (C-145/09, EU:C:2010:708).

35 Judgment of 23 November 2010, *Tsakouridis* (C-145/09, EU:C:2010:708, paragraph 33).

36 See, to that effect, judgment of 23 November 2010, *Tsakouridis* (C-145/09, EU:C:2010:708, paragraph 34).

37 Judgments of 16 January 2014, *Onuekwere* (C-378/12, EU:C:2014:13, paragraph 26), and of 16 January 2014, *G.* (C-400/12, EU:C:2014:9, paragraph 31).

38 Judgment of 16 January 2014, *Onuekwere* (C-378/12, EU:C:2014:13, paragraph 26).

Article 28(3)(a) of Directive 2004/38, and, second, interrupt, as a general rule, continuity of residence for the purposes of the latter provision.[39] The Court considers that if a convicted person could use periods of imprisonment to establish the right to protection provided for in Article 28(2) and (3) of Directive 2004/38, that would clearly be contrary to the aim pursued by that directive.[40] Furthermore, with respect to the question of the extent to which the non-continuous nature of the period of residence during the 10 years preceding the decision to expel the person concerned prevents him from enjoying enhanced protection, an overall assessment must be made of that person's situation on each occasion, at the precise time when the question of expulsion arises.[41]

71. First, I would like to return briefly to my analysis in points 63 and 64 of this Opinion according to which, in the context of Article 28(3)(a) of Directive 2004/38, the grant of enhanced protection against expulsion depends on the answer to the question whether the Union citizen concerned has resided in the host Member State during the 10 years preceding the expulsion decision. Thus, if that period is found to be continuous, all periods of absence or imprisonment during the previous 10 years are deemed to be periods of residence for the purpose of that provision. Consequently, I do not think it is possible to argue that, on the one hand, a period of imprisonment does not interrupt continuity of residence for the purposes of Article 28(3)(a) of Directive 2004/38 and, on the other, at the same time, such a period should not be taken into account when deciding whether a Union citizen has resided in the host Member State for the previous 10 years.[42]

72. Some observations should be made on the Court's finding as recalled in point 70 of this Opinion concerning the effect of a period of imprisonment on the grant of protection against expulsion.

73. In the first place, I think it is unlikely that a Union citizen could constitute a threat to a fundamental interest of society, warranting his expulsion, without having committed a crime of such seriousness that a prison sentence would be justified. Consequently, the vast majority of individuals concerned by protection against expulsion on grounds of public policy or public security, as provided for in Article 28 of Directive 2004/38, at least in systems where expulsion measures are subsequent to the criminal conviction, are in custody when the question of expulsion arises or have recently served a prison sentence. Article 28(3) of Directive 2004/38 would, to a large extent, be deprived of its substance if the imposition of a prison sentence were, as a matter of course, to prevent the grant of protection as provided for in that provision.

74. Furthermore, a Union citizen may be convicted and sentenced to a term of imprisonment even for a strict liability offence. It is questionable whether that situation is comparable to non-compliance with the values enshrined in criminal law, which may be typical of intentional offences. In addition, some Member States have made it possible for short custodial sentences to be imposed for minor offences. The principle of proportionality would be compromised if the same consequences for continuity of residence, in terms of Article 28(3)(a) of Directive 2004/38, were to be drawn from the initial period of a sentence handed down for a serious crime and that of a relatively short term of imprisonment imposed for a minor offence. Last, I do not think that the enforcement of a prison sentence handed down following a wrongful conviction would be capable of interrupting continuity of residence since, in that situation, the offence was never committed and properly established in the context of criminal proceedings. Therefore, even if periods of imprisonment were capable of preventing the grant of enhanced protection under Article 28(3)(a) of Directive 2004/38, it follows that the review of the offence leading to the conviction and enforcement of a custodial sentence is a factor that must not be disregarded when the decision is made to grant such enhanced protection.

39 Judgment of 16 January 2014, *G.* (C-400/12, EU:C:2014:9, paragraph 32).

40 Judgments of 16 January 2014, *Onuekwere* (C-378/12, EU:C:2014:13, paragraph 26), and of 16 January 2014, *G.* (C-400/12, EU:C:2014:9, paragraph 31).

41 Judgment of 16 January 2014, *G.* (C-400/12, EU:C:2014:9, paragraph 35).

42 See, to that effect, the interpretation of Article 28(3)(a) of Directive 2004/38 in the light of the judgment of 16 January 2014, *G.* (C-400/12, EU:C:2014:9, paragraph 35), made by the court that brought the reference for a preliminary ruling in that case, the Upper Tribunal (Immigration and Asylum Chamber), in its judgment of 14 May 2014, [2014] UKUT 392 (IAC).

75. In the second place, it is the offence itself which is directed against the values expressed by the criminal law of the host Member State. The imposition of a prison sentence leads only to the assumption that the convicted person committed a serious offence.

76. If the reasoning adopted by the Court in *Dias*,[43] mentioned in paragraph 25 of *Onuekwere*,[44] which echoes paragraphs 31 and 32 of *G.*,[45] was directly applicable in the context of persons in custody, it would be necessary to consider the period of presence in the host Member State, beginning with the commission of the offence, as interrupting residence. I recall that, in *Dias*,[46] which concerned the legal situation prior to Directive 2004/38, the Court applied by analogy the rules on the effect of absences on the loss of right of residence to a period of presence in the host Member State without a right of residence. The Court held that a decision to reside without authorisation calls into question the integrative link between the person concerned and the relevant Member State since integration is not based solely on temporal and territorial factors, but also on qualitative factors.[47] Therefore, in the same vein, those factors are related to compliance with the values enshrined in the national legal order.

77. It must therefore be understood that in *Onuekwere*[48] and *G.*[49] the Court attributed the interruption in continuity of residence not to the offence itself, but to the imposition of a prison sentence, which prevents national authorities competent to rule on expulsion from adjudicating on criminal liability and its consequences outside criminal proceedings.

78. In the third place, if, as a general rule, the lack of qualitative integration leads to the conclusion that periods of presence in the host Member State interrupt residence for the purpose of Article 28(3)(a) of Directive 2004/38, one may therefore wonder why the degree of integration of a Union citizen during the preceding 10 years is not considered every time the question of his expulsion arises, even if he has never been in custody.

79. Accordingly, I am not persuaded that only non-compliance with the values enshrined in the national legal order justifies the finding that periods of imprisonment automatically interrupt residence for the purpose of Article 28(3)(a) of Directive 2004/38.

(b) Continuity of residence as a condition for enhanced protection against expulsion under Article 28(3)(a) of Directive 2004/38

80. As observed in points 66 to 68 of this Opinion, the overall assessment of integrative links is to be carried out only where continuity of residence for the purpose of Article 28(3)(a) of Directive 2004/38 is called into question. If that continuity is not called into question, the degree of integration acquired during the previous 10 years to which that provision refers is presumed.

81. I note that in *Tsakouridis*,[50] the referring court sought to ascertain the extent to which absences from the host Member State during the period mentioned in Article 28(3)(a) of Directive 2004/38 prevent the person concerned from qualifying for enhanced protection under that provision. Following a period of absence from the host Member State, Mr Tsakouridis was the subject of a forced return to that Member State in order to serve a prison sentence imposed by a criminal court of that Member State. The Court stated that that fact and the time spent in detention may be taken into consideration as part of the overall assessment required in order to determine whether the

43 Judgment of 21 July 2011 (C-325/09, EU:C:2011:498).
44 Judgment of 16 January 2014 (C-378/12, EU:C:2014:13).
45 Judgment of 16 January 2014 (C-400/12, EU:C:2014:9).
46 Judgment of 21 July 2011 (C-325/09, EU:C:2011:498).
47 See judgment of 21 July 2011, *Dias* (C-325/09, EU:C:2011:498, paragraphs 62 and 66).
48 Judgment of 16 January 2014 (C-378/12, EU:C:2014:13).
49 Judgment of 16 January 2014 (C-400/12, EU:C:2014:9).
50 Judgment of 23 November 2010 (C-145/09, EU:C:2010:708).

integrative links previously forged with the host Member State have been broken.[51] Accordingly, the Court was not inclined towards the view that imprisonment interrupts the continuity of the previous 10 years' residence for the purposes of Article 28(3)(a) of Directive 2004/38. It seems to me that the Court was referring rather to the question whether such a period of forced presence in the host Member State following upon periods of absence, against the will of Mr Tsakouridis, made it possible to call in question the finding that the centre of his personal, family or professional interests had been transferred to another Member State on account of his absences from the host Member State.[52]

82. Moreover, my proposed interpretation seems to be consistent with that of the Commission.[53] Indeed, in its Communication it states that 'as a rule, Member States are not obliged to take time actually spent behind bars into account when calculating the duration of residence under Article 28 [of Directive 2004/38] where no links with the host Member State are built'.[54] It may be inferred, *a contrario*, that the Commission has started from the premiss that, when the question arises of the level of protection against expulsion in terms of Article 28(2) and (3) of Directive 2004/38, periods of imprisonment are not irrelevant provided that the Union citizen concerned is one who is firmly settled in the host Member State.

83. While integration, which forms the basis for the system of protection against expulsion measures under Article 28(3)(a) of Directive 2004/38, is to be assessed in the light of the place where the Union citizen in a Member State exercising his freedom of movement has his centre of personal, family or professional interests, implying the existence of a genuine link with that Member State, imprisonment of the Union citizen allows doubt to be cast on his integration in that Member State. Imprisonment is tantamount to a forced presence in the host Member State, which is likely to call into question the finding that — in the words of *Tsakouridis*[55] — the centre of interests was located and maintained in the host Member State in the exercise of freedom of movement. Therefore, in the event of imprisonment, integration during the previous 10 years within the meaning of Article 28(3)(a) cannot be presumed and, in consequence, continuity of residence is called into question.

84. That is even more the case where the degree of integration is to be assessed on the basis of qualitative factors, mentioned in point 76 of this Opinion, notwithstanding the fact that, in my view, those factors may constitute evidence of the actual location of the centre of personal interests of a Union citizen in the host Member State. During detention, integration in the society of the host Member State is likely to be disrupted due to the restriction on the Union citizen's freedom. Furthermore, a custodial sentence which isolates the offender from society is generally the measure of last resort available to Member States, the only real practical way to protect society against extremely dangerous individuals. In principle, therefore, non-custodial sentences should be preferred by the criminal courts and imprisonment should be imposed only to punish conduct that is clearly unacceptable to society in the host Member State. It follows that the imposition of a prison sentence allows the presumption that the individual in question has committed a serious offence, and consequently it is likely that he does not respect social values in the host Member State.

85. Having regard to the foregoing, in the event of imprisonment, it is necessary to carry out an overall assessment of all relevant factors in each individual case in order to determine whether integrative links were previously forged with the host Member State or whether those links were broken during imprisonment, so that enhanced protection under Article 28(3)(a) of Directive 2004/38 cannot be granted.

51 Judgment of 23 November 2010, *Tsakouridis* (C-145/09, EU:C:2010:708, paragraph 34).

52 Judgment of 23 November 2010, *Tsakouridis* (C-145/09, EU:C:2010:708, paragraph 33).

53 Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC (COM(2009) 313 final).

54 See p. 14.

55 Judgment of 23 November 2010 (C-145/09, EU:C:2010:708).

86. Moreover, in contrast to the concerns raised by the referring court in the third question referred for a preliminary ruling in Case C-424/16, I do not perceive any 'tension' between the test set out in Article 28(3)(a) of Directive 2004/38 and the overall assessment of an integrative link, or any lack of clarity with respect to the overall assessment. That assessment is to be conducted only when the question arises of continuity of residence during the previous 10 years for the purposes of Article 28(3)(a) of Directive 2004/38 in order to determine whether that continuity was maintained notwithstanding periods of absence or imprisonment.

87. In the light of the foregoing, I propose that the Court answer the second and third questions referred for a preliminary ruling in Case C-424/16 as follows: the expression 'the previous 10 years' in Article 28(3)(a) of Directive 2004/38 must be interpreted as referring to a continuous period, calculated by looking back from the precise time when the question of expulsion arises, that includes any periods of absence or imprisonment, provided that none of those periods of absence or imprisonment has had the effect of breaking the integrative links with the host Member State.

C. Questions referred in Case C-316/16: factors considered in the overall assessment of the integrative links with the host Member State

1. Are the two factors of long-term settlement in the host Member State and a complete lack of ties with the Member State of origin sufficient grounds for the person concerned to qualify for enhanced protection under Article 28(3) of Directive 2004/38?

88. By the first question referred for a preliminary ruling in Case C-316/16, the national court asks whether it is possible to dismiss from the outset the proposition that a conviction and the subsequent enforcement of a custodial sentence are liable to break the integrative links in the host Member State of a Union citizen who, after entering that Member State at the age of three, spent his entire life there and no longer has any ties to the Member State of his nationality, where the offence that resulted in his conviction and the enforcement of a custodial sentence was committed after a period of residence of 20 years, where, consequently, there is no continuous period of residence for the previous 10 years, for the purposes of Article 28(3)(a) of Directive 2004/38, and where, therefore, there is no requirement to grant him protection against expulsion under that provision.

89. It seems to me that, by this question, the national court essentially seeks to ascertain whether the two factors of long-term settlement in the host Member State and the complete lack of ties with the Member State of nationality are sufficient grounds for the person concerned to qualify for enhanced protection in terms of Article 28(3) of Directive 2004/38.

90. It is true that the situation envisaged in Article 28(3)(a) of Directive 2004/38 is directed in particular at Union citizens who have resided in the host Member State their whole lives, as stated in recital 24 of that directive. A significant period of residence in the host Member State therefore provides enhanced protection against expulsion in terms of that provision.

91. However, as the Court stated in *Tsakouridis*[56] with reference to recital 24 of Directive 2004/38, where qualification for enhanced protection against expulsion in terms of Article 28(3)(a) of that directive is concerned, the decisive test is whether the Union citizen has resided in the host Member State for the 10 years preceding the expulsion decision.

56 Judgment of 23 November 2010 (C-145/09, EU:C:2010:708, paragraph 38). Also see, to that effect, judgment of 16 January 2014, *G.* (C-400/12, EU:C:2014:9, paragraph 37).

92. In principle, that period must be continuous. When the question arises of the continuity of the period, an overall assessment must be carried out in order to determine whether the integrative links previously forged with the host Member State have been broken, so that enhanced protection will or will not be granted.

93. It is apparent from the Court's case-law that, in the context of that 'overall' assessment, it is necessary — as the word suggests — to take 'all the relevant factors into consideration in each individual case'.[57] As explained in points 83 and 84 of this Opinion, the integration of a Union citizen in the host Member State is based on temporal, territorial and qualitative factors. Therefore, in contrast to the situation envisaged in the first question referred for a preliminary ruling, the length of residence, as a purely temporal criterion, cannot be the only criterion used in order to assess the degree of the integrative links.

94. Having regard to the above, the scope of the overall assessment carried out to determine whether integrative links have been broken cannot be confined to the criteria of long-term settlement in the host Member State and the complete lack of ties with the Member State of origin.

2. Consideration of the period of imprisonment in the overall assessment of the situation of the person concerned in the context of the differences between national systems

(a) Preliminary observations

95. By the second question referred for a preliminary ruling, the referring court considers that the Union citizens at issue, whose expulsion is ordered while they are in prison by means of an administrative decision taken after the criminal conviction, are placed at a disadvantage — which cannot be substantively justified — in comparison with Union citizens who live in a Member State the authorities of which order expulsion as a penalty or as an incidental measure.

96. By the fourth question referred for a preliminary ruling, the referring court seeks to ascertain whether EU law contains provisions for determining 'the precise time when the question of expulsion arises',[58] specifying when an overall assessment of the situation of the person concerned is to be carried out. Should the case arise, it would be for Member States to adopt detailed procedural rules in that connection, with due regard for the principle of procedural autonomy.

97. By that fourth question, the national court revisits a concern previously raised in the context of its second question. It takes the view that the different decision-making systems serve to vary the outcome of the overall assessment of the integrative links depending on when the expulsion decision is taken. In systems where expulsion measures are adopted outside the framework of criminal proceedings, the duration of detention is likely to be relatively short if the competent authority adopts an expulsion measure soon after conviction. On the contrary, a delay in adopting an expulsion measure may result in integrative links being broken on account of an extended period of imprisonment.

98. It seems to me that the concerns raised in the second and fourth questions referred for a preliminary ruling broach the same subject. It is true that, in its expression of uncertainty in the second question, the referring court is concerned more with the temporal scope of the overall assessment of integrative links, enquiring whether that assessment has to include the period of imprisonment, while by the fourth question it seeks to clarify the decisive point in time for assessing the factual situation in order to determine whether the person concerned qualifies for enhanced

57 See, to that effect, judgments of 23 November 2010, *Tsakouridis* (C-145/09, EU:C:2010:708, paragraph 33), and of 16 January 2014, *G.* (C-400/12, EU:C:2014:9, paragraph 36).

58 In that respect, the national court refers to the abovementioned judgments of 23 November 2010, *Tsakouridis* (C-145/09, EU:C:2010:708, paragraph 32), and of 16 January 2014, *G.* (C-400/12, EU:C:2014:9, paragraph 35).

protection under Article 28(3)(a) of Directive 2004/38. However, it is conceivable that that assessment might be carried out retrospectively, with reference to the time prior to enforcement of the prison sentence, making it possible to disregard the impact of the sentence on integrative links and avoid complications deriving from the differences between national systems. If that were the case, the second question referred could be the subject of a similar analysis.

99. Thus, by its second and fourth questions, the referring court seeks, in essence, to ascertain whether, under EU law, the period of enforcement of a custodial sentence should be taken into account in the overall assessment of integrative links.

100. According to the referring court, in a system such as that at issue in the main proceedings, the inclusion of the enforcement of a custodial sentence would deprive the citizens of other Member States of the benefit of enhanced protection against expulsion as provided for in Article 28(3)(a) of Directive 2004/38, since the administrative decision is generally taken while the person concerned is in custody, after continuity of residence has been interrupted due to the enforcement of a custodial sentence.

101. However, the national court considers that the identification of the decisive point in time when the question of expulsion arises cannot be a matter for national procedural law, since the determination of that moment establishes the substantive level of protection which Union citizens must enjoy. Starting from that premiss, the national court appears to take the view that that decisive point in time, which ensures the uniform application of Article 28(3)(a) of Directive 2004/38, is when the court adjudicating on the substance of the expulsion takes a decision.

102. The German and United Kingdom Governments submit that the question of the decisive point in time for the administrative courts' decision on expulsion is a matter for national law, while the Commission, like the national court, appears to be of the opinion that that moment should be determined independently by the EU legislature, as should the point in time when the courts are to rule on the expulsion decision.

(b) Consistency between the assessment of integrative links and the assessment of the immediacy of the threat to the interests of the host Member State

103. First of all, I note that EU law does not specify the type of system within the framework of which expulsion measures have to be adopted or the point in time at which national authorities must take those measures. Directive 2004/38 does, however, expressly define the circumstances in which expulsion measures may be validly taken.

104. In accordance with settled case-law,[59] which the EU legislature reaffirmed on several occasions in Directive 2004/38,[60] the requirement relating to the existence of a present ground for expulsion must be satisfied at the time of the expulsion. Specifically, when the question of expulsion arises, the present and genuine nature of the grounds justifying it must be examined, as provided for in Article 27(2) of Directive 2004/38.

105. Therefore, even though it is indeed the case that the enforcement of a custodial sentence is, as a rule, capable of interrupting the previous 10 years' residence within the meaning of Article 28(3)(a) of Directive 2004/38 in systems where expulsion measures follow upon a criminal conviction, it appears that, during imprisonment, the threat posed to the host Member State's interests by the person

59 Judgment of 27 October 1977, *Bouchereau* (30/77, ECLI:EU:C:1977:172, paragraph 28). Also see judgments of 22 May 1980, *Santillo* (131/79, EU:C:1980:131, paragraphs 18 and 19) and of 29 April 2004, *Orfanopoulos and Oliveri*, (C-482/01 and C-493/01, EU:C:2004:262, paragraphs 78 and 79).

60 See, to that effect, my Opinion in *Petrea* (C-184/16, EU:C:2017:324, points 57 and 58).

detained must, in principle, decrease. In line with Member States' current criminal policy, the imposition of a custodial sentence by a criminal court not only punishes unlawful conduct, but also seeks to isolate offenders until such time as they no longer present a threat to society and to rehabilitate them so that they can lead a socially responsible and law-abiding life, after a period of detention.[61]

106. By contrast, in systems where expulsion measures are ordered by the criminal courts as a penalty or incidental aspect of a custodial sentence, the continuity of the previous 10 years' residence within the meaning of Article 28(3)(a) of Directive 2004/38 is not called into question on account of the imprisonment. However, the level of threat posed to the host Member State's interests is to be assessed in the light of the circumstances prior to imprisonment, that is to say when the threat is at its greatest. The point in time when the offence is committed is the clearest expression of that threat.

107. It would therefore be inconsistent if, in systems where expulsion measures are taken by administrative decision, the immediacy of the threat to the host Member State's interests were to be assessed in the light of the circumstances prevailing when the expulsion measure was adopted, while the degree of integration, which determines the level of protection against expulsion, were to be assessed retrospectively, with reference to an earlier point in time.

(c) The function of prison sentences

108. As regards the national court's concern that, in a system such as that at issue in the main proceedings, the citizens of other Member States could never enjoy enhanced protection against expulsion if integrative links were to be assessed in the light of the circumstances prevailing during imprisonment, it seems to me that, as its doubts are expressed, the national court essentially starts from the premiss that a period of detention should inevitably result in the breakage of integrative links in the host Member State and, in consequence, the interruption of continuity of residence for the purpose of Article 28(3)(a) of Directive 2004/38.

109. However, I think it is perfectly realistic to allow that a person serving a sentence of imprisonment of at least five years keeps his ties with the host Member State, by maintaining family links during his detention.

110. Moreover, to exclude a period of detention from the overall assessment would be at odds with Member States' current criminal policy, according to which the rehabilitation of offenders, enabling them to recover their place in society after detention, is the basic function of the sentence. If the fact that imprisonment breaks ties with the host Member State had to be regarded as a rule admitting no exceptions, offenders would have no encouragement to cooperate with the prison system entrusted with their rehabilitation. By contrast, giving consideration to the circumstances prevailing during the period of imprisonment allows account to be taken of the dynamics of the process of rehabilitating offenders during their imprisonment, so that their efforts are likely to prevent further deterioration of integrative links in the host Member State, while an inflexible approach may have the opposite effect on those links.

(d) Twofold assessment of the integrative links

111. The question whether the requirement set out in Article 28(3)(a) of Directive 2004/38 is met, namely whether the person concerned has resided in the host Member State for the previous 10 years, arises where the competent authority intends to adopt an expulsion measure.

61 In that regard, see points 48 to 50 of the Opinion of Advocate General Bot in *Tsakouridis* (C-145/09, EU:C:2010:322). Also see the observations of Advocate General Bot in point 29 of his Opinion in *Mantello* (C-261/09, EU:C:2010:501).

112. According to the analysis conducted by the Court in *I.*, in the situations covered by Article 28(3) of Directive 2004/38, it is also necessary to carry out the review provided for in Article 28(1) of that directive.[62] Under that provision, before taking an expulsion decision on grounds of public policy or public security, the host Member State must take account of considerations such as the social and cultural integration of the individual concerned in the host Member State, in addition to how long he has resided there, and his age, state of health and family and economic situation. It follows that, in accordance with the wording of Article 28(1) of Directive 2004/38, read in the light of recital 23 of that directive, the factors mentioned above, which may evolve over time and are part of the fabric of the review carried out prior to the adoption of an expulsion decision, must be assessed in the light of the circumstances prevailing when the question of expulsion arises, with due regard for the principle of proportionality.

113. However, the national court observes that the integrative links of the person concerned can be assessed, on the one hand, independently, under Article 28(1) of Directive 2004/38, before any expulsion decision has been taken, and, on the other hand, as part of the overall assessment to determine whether continuity of residence during the previous 10 years within the meaning of Article 28(3)(a) of that directive has been maintained. Therefore, according to the national court, the degree of integration may be subject to a twofold assessment in connection with a single expulsion decision, which is not consistent with the aims of Directive 2004/38.

114. First, I note that when it is shown that 'imperative grounds of public security' justify the expulsion of an individual, the question of whether or not he has resided in the host Member State during the previous 10 years for the purposes of Article 28(3)(a) of Directive 2004/38 is no longer important, since the protection provided by that provision does not protect an individual against expulsion based on such grounds. In those circumstances, therefore, the review referred to in Article 28(1) of Directive 2004/38 must be carried out. At that stage, it may become apparent that the expulsion measure cannot be adopted. It follows that the degree of integration is assessed only once in the context of Article 28(3)(a) of Directive 2004/38.

115. However, where there are 'serious grounds of public policy or public security' within the meaning of Article 28(2) of Directive 2004/38, it is necessary to determine whether the individual has resided in the host Member State during the previous 10 years within the meaning of Article 28(3)(a) of Directive 2004/38. If that is indeed the case, expulsion may not be ordered, otherwise, the review provided for in Article 28(1) of Directive 2004/38 must be carried out.

116. It is true that, in those circumstances, the integrative links appear to be assessed twice. However, I am not persuaded by the argument that the twofold assessment of the integrative links is inconsistent with the aims of Directive 2004/38.

117. First, although the objective of the overall assessment is to determine whether continuity of residence has been interrupted during the previous 10 years, the aim of the review conducted under Article 28(1) of Directive 2004/38 is to ascertain whether expulsion would be proportionate in the light of the current circumstances, being those prevailing when the question of expulsion arises. Thus, the fact that the person concerned succeeded in re-forging his links with the host Member State after they were broken during the previous 10 years may alter the outcome of the review conducted under Article 27(2) of Directive 2004/38. However, that fact is not capable of calling in question the interruption of residence, so that enhanced protection under Article 28(3)(a) of that directive will not be granted.

62 Judgment of 22 May 2012 (C-348/09, EU:C:2012:300, paragraphs 32 and 34).

118. Second, the degree of integration may not be sufficiently high to ensure continuity of residence for the purpose of Article 28(3)(a) of Directive 2004/38 but, at the same time, it may be enough to prevent expulsion on the basis of the principle of proportionality. By contrast, if the integrative link was assessed only once, a person threatened by an expulsion measure could not derive any benefit from his social and cultural integration in the host Member State.

119. Therefore, I do not think that there are any grounds that could justify not taking account of a custodial sentence, imposed due to the commission of an offence, in the overall assessment to determine whether continuity of residence has been maintained.

120. In the light of the foregoing, I take the view that the decisive point in time for the overall assessment of the integrative links in the context of Directive 2004/38 must be the point of time when the authorities rule on the expulsion decision.

3. The relevant factors in the overall assessment to determine whether integrative links have been broken following the enforcement of a custodial sentence handed down for the offence constituting the ground for expulsion

121. By the third question referred for a preliminary ruling in Case C-316/16, the referring court enquires about the relevant criteria to be used to determine whether integrative links were maintained notwithstanding the period of imprisonment so that enhanced protection under Article 28(3)(a) of Directive 2004/38 may or may not be granted.

122. First of all, as explained in point 110 of this Opinion, to exclude any assessment of the circumstances arising during imprisonment would be at odds with Member States' current criminal policy and would undermine the main function of custodial sentences.

123. In that regard, the national court reaffirms that the aim of custodial sentences under German law is to contribute to EU citizens' social reinsertion and allow them to lead a socially responsible and law-abiding life. Starting from that premiss, the national court suggests that account should be taken of the following criteria in the context of the overall assessment: how the penalty is enforced; consideration of the offence committed; general behaviour while in detention; acceptance and completion of treatment; work; participation in educational and ongoing vocational programmes; participation in the enforcement of the sentence; and maintenance of personal and family ties in the host Member State.

124. The criteria listed by the national court seem to me to be useful for assessing the integrative links of a person in custody.

125. In addition, it follows from my observations in point 74 of this Opinion that the offence resulting in a conviction and enforcement of a custodial sentence and the circumstances in which that offence was committed are relevant factors for assessing the integrative links.

126. Last, some criteria that are not directly related to the custodial sentence are also relevant. It is apparent from *G.* that the length of residence in the host Member State prior to imprisonment may be taken into account in the overall assessment of integrative links.[63] Accordingly, it seems to me that the stronger the integrative links — which can be established in the light of, in particular, the circumstances prior to imprisonment — the more disruptive the period that interrupts continuity of residence must be if the person concerned is to forfeit enhanced protection against expulsion in terms of Article 28(3)(a) of Directive 2004/38.

63 Judgment of 16 January 2014 (C-400/12, EU:C:2014:9, paragraph 37).

127. It follows that, when the question of expulsion arises, it is necessary, in order to determine whether the integrative links previously forged with the host Member State have been broken due to a period of imprisonment, with the result that enhanced protection under Article 28(3)(a) of Directive 2004/38 may or may not be granted, to carry out an overall assessment *in concreto* taking account of all relevant factors in each individual case, concerning all periods of presence in that Member State, including periods of imprisonment.

VI. Conclusion

128. In the light of the foregoing considerations, I propose that the Court answer the questions referred for a preliminary ruling by the Verwaltungsgerichtshof Baden-Württemberg (Higher Administrative Court, Baden-Württemberg, Germany) and the Supreme Court of the United Kingdom as follows:

In Case C-424/16:

(1) The acquisition of a right of permanent residence within the meaning of Article 16 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, as amended by Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011, is a prerequisite of enjoying enhanced protection under Article 28(3)(a) of that directive.

(2) The expression 'the previous 10 years' in Article 28(3)(a) of Directive 2004/38 must be interpreted as referring to a continuous period, calculated by looking back from the precise time when the question of expulsion arises, that includes any periods of absence or imprisonment, provided that none of those periods of absence or imprisonment has had the effect of breaking the integrative links with the host Member State.

In Case C-316/16:

When the question of expulsion arises, it is necessary, in order to determine whether enhanced protection under Article 28(3)(a) of Directive 2004/38, as amended by Regulation No 492/2011, may or may not be granted following a period of imprisonment, to carry out an overall assessment *in concreto* taking account of all relevant factors, in each individual case, relating to all periods of presence in that Member State, including periods of imprisonment, so as to ascertain whether a period of imprisonment has had the effect of breaking the integrative links with the host Member State over the previous 10 years.