

JUDGMENT OF THE COURT (Third Chamber)

21 July 2011 *

In Case C-325/09,

REFERENCE for a preliminary ruling under Article 234 EC from the Court of Appeal (England and Wales) (Civil Division) (United Kingdom), made by decision of 4 August 2009, received at the Court on 12 August 2009, in the proceedings

Secretary of State for Work and Pensions

v

Maria Dias,

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, D. Šváby, R. Silva de Lapuerta (Rapporteur), G. Arestis and J. Malenovský, Judges,

* Language of the case: English.

Advocate General: V. Trstenjak,
Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 16 December 2010,

after considering the observations submitted on behalf of:

- Ms Dias, by A. Berry, Barrister, instructed by J. Borrero, Solicitor,

- the United Kingdom Government, by S. Ossowski, acting as Agent, and by K. Smith, Barrister,

- the Danish Government, by B. Weis Fogh, acting as Agent,

- the Portuguese Government, by L. Fernandes, acting as Agent,

- the European Commission, by D. Maidani and M. Wilderspin, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 17 February 2011,

gives the following

Judgment

- ¹ The present reference for a preliminary ruling concerns the interpretation 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 (OJ 2004 L 158, p. 77 and – corrigenda – OJ 2004 L 229, p. 35, and OJ 2005 L 197, p. 34), with regard to periods of residence which were completed before the date of transposition of that directive, and the interpretation of Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families (OJ, English Special Edition 1968 (II), p. 485), in relation to residence permits issued in accordance with Directive 68/360.
- ² The reference has been made in proceedings between the Secretary of State for Work and Pensions and Ms Dias relating to her right to receive income support.

Legal context

European Union law

Directive 68/360

3 Under Article 4 of Directive 68/360:

‘1. Member States shall grant the right of residence in their territory to [nationals of those States and to members of their family covered by Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (O), English Special Edition 1968 (II), p. 475) who are able to produce the documents listed in paragraph 3.

2. As proof of the right of residence, a document entitled “Residence Permit for a National of a Member State of the EEC” shall be issued. This document must include a statement that it has been issued pursuant to Regulation ... No 1612/68 and to the measures taken by the Member States for the implementation of the present Directive. The text of such statement is given in the Annex to this Directive.

3. For the issue of a Residence Permit for a National of a Member State of the EEC, Member States may require only the production of the following documents:

— by the worker:

(a) the document with which he entered their territory;

(b) a confirmation of engagement from the employer or a certificate of employment;

...'

4 Article 6 of Directive 68/360 provided as follows:

'1. The residence permit:

(a) must be valid throughout the territory of the Member State which issued it;

(b) must be valid for at least five years from the date of issue and be automatically renewable.

2. Breaks in residence not exceeding six consecutive months and absence on military service shall not affect the validity of a residence permit.

3. Where a worker is employed for a period exceeding three months but not exceeding a year in the service of an employer in the host State or in the employ of a person providing services, the host Member State shall issue him a temporary residence permit, the validity of which may be limited to the expected period of the employment.

Subject to the provisions of Article 8(1)(c), a temporary residence permit shall be issued also to a seasonal worker employed for a period of more than three months. The period of employment must be shown in the documents referred to in paragraph 4(3)(b).'

5 Article 7 of Directive 68/360 provided:

'1. A valid residence permit may not be withdrawn from a worker solely on the grounds that he is no longer in employment, either because he is temporarily incapable of work as a result of illness or accident, or because he is involuntarily unemployed, this being duly confirmed by the competent employment office.

2. When the residence permit is renewed for the first time, the period of residence may be restricted, but not to less than twelve months, where the worker has been involuntarily unemployed in the [host] Member State for more than twelve consecutive months.'

- 6 The annex to Directive 68/360, entitled ‘Text of the statement referred to in Article 4(2)’, stated as follows:

‘This permit is issued pursuant to Regulation (EEC) No 1612/68 of the Council of the European Communities of 15 October 1968 and to the measures taken in implementation of the Council Directive of 15 October 1968.

In accordance with the provisions of the abovementioned Regulation, the holder of this permit has the right to take up and pursue an activity as an employed person in ... territory under the same conditions as ... workers.

...’

Directive 90/364/EEC

- 7 Article 1(1), first subparagraph, of Council Directive 90/364/EEC of 28 June 1990 on the right of residence (OJ 1990 L 180, p. 26), was worded as follows:

‘Member States shall grant the right of residence to nationals of Member States who do not enjoy this right under other provisions of Community law and to members of their families as defined in paragraph 2, provided that they themselves and the members of their families are covered by sickness insurance in respect of all risks in the host Member State and have sufficient resources to avoid becoming a burden on the social assistance system of the host Member State during their period of residence.’

8 According to Article 2(1) and (2) of that directive:

'1. Exercise of the right of residence shall be evidenced by means of the issue of a document known as a "Residence permit for a national of a Member State of the EEC", the validity of which may be limited to five years on a renewable basis. However, the Member States may, when they deem it to be necessary, require revalidation of the permit at the end of the first two years of residence. Where a member of the family does not hold the nationality of a Member State, he or she shall be issued with a residence document of the same validity as that issued to the national on whom he or she depends.

For the purpose of issuing the residence permit or document, the Member State may require only that the applicant present a valid identity card or passport and provide proof that he or she meets the conditions laid down in Article 1.

2. Articles 2, 3, 6(1)(a) and (2) and Article 9 of Directive 68/360/EEC shall apply *mutatis mutandis* to the beneficiaries of this Directive.

...

Member States shall not derogate from the provisions of this Directive save on grounds of public policy, public security or public health. ...'

9 Article 3 of Directive 90/364 provided:

‘The right of residence shall remain for as long as beneficiaries of that right fulfil the conditions laid down in Article 1.’

Directive 2004/38

10 Recital 17 in the preamble to Directive 2004/38 states:

‘Enjoyment of permanent residence by Union citizens who have chosen to settle long-term in the host Member State would strengthen the feeling of Union citizenship and is a key element in promoting social cohesion, which is one of the fundamental objectives of the Union. A right of permanent residence should therefore 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 during a continuous period of five years without becoming subject to an expulsion measure.’

11 Chapter III of Directive 2004/38, entitled ‘Right of residence’, comprises Articles 6 to 15 of that directive.

12 Under the heading ‘Right of residence for up to three months’, Article 6 of Directive 2004/38 states:

‘1. Union citizens shall 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.

2. The provisions of paragraph 1 shall also apply to family members in possession of a valid passport who are not nationals of a Member State, accompanying or joining the Union citizen.'

- 13 Article 7 of Directive 2004/38, headed 'Right of residence for more than six months,' is worded as follows:

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

- (a) are workers or self-employed persons in the host Member State; or
- (b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; or
- (c) — are enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training; and
 - have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority, by means of a declaration or by such equivalent means as they may choose, that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence; or

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

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

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

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

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

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

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

4. By way of derogation from paragraphs 1(d) and 2 above, only the spouse, the registered partner provided for in Article 2(2)(b) and dependent children shall have the right of residence as family members of a Union citizen meeting the conditions under 1(c) above. Article 3(2) shall apply to his/her dependent direct relatives in the ascending lines and those of his/her spouse or registered partner.

¹⁴ In Chapter IV of Directive 2004/38, entitled 'Right of permanent residence,' Article 16 of that directive, itself headed 'General rule for Union citizens and their family members,' provides as follows:

'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.

2. Paragraph 1 shall apply also to family members who are not nationals of a Member State and have legally resided with the Union citizen in the host Member State for a continuous period of five years.

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 twelve 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.'

¹⁵ Article 38 of Directive 2004/38 provides:

'1. Articles 10 and 11 of Regulation (EEC) No 1612/68 shall be repealed with effect from 30 April 2006.

2. 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 shall be repealed with effect from 30 April 2006.

3. References made to the repealed provisions and Directives shall be construed as being made to this Directive.'

¹⁶ In accordance with the first subparagraph of Article 40(1) of Directive 2004/38, the Member States were required to bring into force the laws, regulations and administrative provisions necessary to comply with that directive by 30 April 2006.

National law

- 17 The Social Security Contributions and Benefits Act 1992 and the Income Support (General) Regulations 1987 constitute the legislation applicable to income support.
- 18 Income support is a means-tested benefit for various groups of persons. Receipt of the benefit is subject to, inter alia, the condition that the income may not exceed the 'applicable amount' laid down, which may be prescribed as nil, which means, in practice, that in that case no benefit is paid.
- 19 The applicable amount prescribed for 'a person from abroad' is nil, such a person being defined as 'a claimant who is not habitually resident in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland'. In order to be regarded as habitually resident in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland, the claimant for income support must have a 'right to reside' there.
- 20 The 'right to reside' which entitles the holder to claim income support is not expressly defined. Since May 2004, national law has sought to restrict payment of that benefit in order to ensure that certain persons do not become an unreasonable burden on the social assistance system.

- 21 Thus, with regard to citizens of the European Union, certain rights of residence, such as that granted in accordance with Article 6 of Directive 2004/38, are excluded and the payment of income support is therefore not allowed. By contrast, among other groups of persons, workers or self-employed persons within the meaning of that directive – including those who retain such a status, in accordance with Article 7(3) of that directive –, and members of their family within the meaning of that directive, are not regarded as ‘persons from abroad’ for the purposes of income support and are for that reason entitled to receive that benefit.
- 22 It is generally accepted that the right of permanent residence provided for in Article 16 of Directive 2004/38 constitutes a right of residence which allows income support to be received.

The dispute in the main proceedings and the questions referred for a preliminary ruling

- 23 Ms Dias is a Portuguese national who entered the United Kingdom in January 1998. According to the referring court, her residence can be divided into the following five periods (‘the first to fifth periods’):

— January 1998 to summer 2002: in work;

— summer 2002 to 17 April 2003: on maternity leave;

— 18 April 2003 to 25 April 2004: not working;

— 26 April 2004 to 23 March 2007: in work, and

— since 24 March 2007: not working.

²⁴ On 13 May 2000, the Home Office issued Ms Dias with a residence permit corresponding to the right of residence provided for in Article 4 of Directive 68/360. That permit contained the statement set out in the annex to that directive. In addition, it indicated a period of validity from 13 May 2000 to 13 May 2005 and stated that ‘the validity of this permit is the time-limit on your stay in the UK. This time-limit will apply, unless superseded, to any subsequent leave to enter you may obtain after an absence from the UK within the period of the validity of this permit.’

²⁵ At the end of March 2007, Ms Dias applied for income support.

²⁶ According to the Social Security Commissioner, since Ms Dias no longer, at that date, had the status of a worker within the meaning of Directive 2004/38, she could claim income support only as the holder of a right of permanent residence pursuant to Article 16 of that directive. In that regard, the Commissioner took the view that that right of residence could be claimed only after the date on which Directive 2004/38 had been transposed in the United Kingdom, that is to say, as from 30 April 2006.

- 27 In so far as, according to the Commissioner, Ms Dias was also no longer a worker within the meaning of European Union law during the third period of her residence in the United Kingdom, he found that she could not add that period, for the purposes of the right of permanent residence, either to the first or second periods of residence or to the fourth period.
- 28 However, the Commissioner took the view that Ms Dias' residence during the third period could be treated as a valid period of residence for the purposes of the right of permanent residence, either because of the residence permit which had been issued to her or pursuant to Article 18 EC.
- 29 The Commissioner accordingly decided to grant income support to Ms Dias.
- 30 The Commissioner's decision has been challenged by the Secretary of State for Work and Pensions before the referring court.
- 31 According to the referring court, the Commissioner's decision is based on the assumption that the right of permanent residence provided for under Article 16 of Directive 2004/38 may not take into account periods of residence which ended before 30 April 2006, the date on which that directive was transposed in the United Kingdom. For its part, the referring court takes the view that such periods may be taken into account for the purposes of determining that right of residence. However, inasmuch as that question was the subject of the reference for a preliminary ruling which it made in the case which led to the judgment of 7 October 2010 in Case C-162/09 *Lassal* [2010] ECR I-9217, it did not consider it necessary to refer the same question to the Court a second time.

32 Proceeding on the assumption of the Commissioner, the referring court takes the view, like him, that Ms Dias could not be regarded as a worker, within the meaning of European Union law, during the third period of her residence in the United Kingdom. By contrast, that court finds that, during that period, Ms Dias was unable to derive a right of residence under Article 16 of Directive 2004/38 on the basis solely of the residence permit which had been issued to her. Finally, in the view of the referring court, Ms Dias' residence during that period could be regarded as a valid period of residence for the purposes of the determination of the right of permanent residence, on the basis of Article 18 EC alone, should it be found that Article 16 of Directive 2004/38 contains a lacuna in regard to periods of residence completed before the date on which that directive was transposed into the legal systems of the Member States.

33 In those circumstances, the Court of Appeal (England and Wales) (Civil Division) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) If a European Union citizen, present in a Member State of which she is not a national, was, prior to the transposition of Directive 2004/38 ..., the holder of a residence permit validly issued pursuant to Article 4(2) of Directive 68/360 ..., but was for a period of time during the currency of the permit voluntarily unemployed, not self-sufficient and outside the qualifications for the issue of such a permit, did that person, by reason only of her possession of the permit, remain during that time someone who "resided legally" in the host Member State for the purpose of later acquiring a permanent right of residence under Article 16(1) of Directive 2004/38 ...?

(2) If five years' continuous residence as a worker prior to 30 April 2006 [in the territory of a host Member State] does not qualify to give rise to the permanent right of residence created by Article 16(1) of Directive 2004/38 ..., does such continuous

residence as a worker give rise to a permanent right of residence directly pursuant to Article 18(1) [EC] on the grounds that there is a lacuna in the Directive?’

Consideration of the questions referred

Preliminary observations concerning the consequences of the judgment in Lassal for the case in the main proceedings

³⁴ As has been pointed out in paragraph 31 of the present judgment, the questions raised by the referring court are based on the Commissioner’s assumption that, since Ms Dias’ periods of residence in the United Kingdom ended before the date on which Directive 2004/38 was transposed in that Member State, that is to say, 30 April 2006, they cannot be taken into consideration for the purposes of the acquisition of the right of permanent residence provided for in Article 16 of that directive. Although the referring court takes the view that such an assumption is incorrect, it did not consider it necessary to refer a new question to the Court in that regard since that question had already been submitted in the reference for a preliminary ruling which it made in the case leading to the judgment in *Lassal*.

³⁵ In *Lassal*, the Court held, first, that continuous periods of residence of five years which were completed before the date of transposition of Directive 2004/38, namely 30 April 2006, in accordance with earlier European Union law instruments, must be taken into account for the purposes of the acquisition of the right of permanent residence pursuant to Article 16(1) of that directive and, second, that absences from the host Member State of less than two consecutive years, which occurred before 30 April

2006 but following a continuous period of five years' legal residence completed before that date, are not such as to affect the acquisition of the right of permanent residence pursuant to Article 16(1) of the directive.

- 36 It follows that the assumption on which the questions referred for a preliminary ruling were based is, as the referring court has correctly pointed out, erroneous and that those questions must be examined in the light of the judgment in *Lassal*.
- 37 In that regard, as follows from paragraph 23 of the present judgment, it must be noted, first, that Ms Dias resided in the United Kingdom as a worker, within the meaning of the instruments of European Union law in force at that time, from January 1998 to 17 April 2003 (first and second periods of her residence).
- 38 Consequently, it must be held that Ms Dias completed a continuous period of five years' residence in the United Kingdom before the date on which Directive 2004/38 was transposed in that Member State, that is to say, 30 April 2006, in accordance with the European Union law instruments in force before that date, and that that period must be taken into consideration for the purposes of the acquisition of the right of permanent residence under Article 16(1) of that directive.
- 39 Second, during the third period of her residence in the United Kingdom, that is to say, from 18 April 2003 to 25 April 2004, Ms Dias was voluntarily unemployed and therefore did not have the status of a worker within the meaning of the European Union law instruments in force at that time. By contrast, she had recovered such status during her fourth period of residence in the United Kingdom, that is to say, from 26 April 2004 to 23 March 2007. In addition, during that third period, Ms Dias continued to hold the residence permit which had been validly issued to her on 13 May 2000 in her capacity as a worker, pursuant to Directive 68/360, notwithstanding the fact that,

during that period, she did not satisfy the conditions entitling her to a right of residence under either European Union law or national law.

- 40 Since the right of permanent residence provided for in Article 16(1) of Directive 2004/38 could be acquired only as from 30 April 2006 (*Lassal*, paragraph 38), the question thus arises as to what is the effect, for the purposes of the acquisition of the right of permanent residence under that provision, of a period of residence such as that completed between 18 April 2003 and 25 April 2004, that is to say, Ms Dias' third period of residence in the United Kingdom.
- 41 Consequently, in the light of *Lassal*, the questions submitted by the referring court should be reformulated to mean that that court is asking, in essence, whether the periods of residence of a Union citizen in a host Member State which were completed on the basis solely of a residence permit validly issued pursuant to Directive 68/360, without the conditions governing entitlement to any right of residence having been met, and which occurred before 30 April 2006 but after a period of continuous legal residence of five years which ended prior to that date, are such as to affect the acquisition of the right of permanent residence under Article 16(1) of Directive 2004/38.

Consideration of the questions referred for a preliminary ruling, as reformulated by the Court in the light of the Lassal judgment

- 42 In order to reply to the questions submitted by the referring court, as reformulated by the Court, it is necessary to examine, first, the question whether periods of residence of a citizen of the Union in a host Member State completed on the basis solely of a

residence permit validly issued under Directive 68/360, 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 regard, it should be noted that the Court has already held that periods of continuous residence of five years, 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 acquisition of the right of permanent residence pursuant to Article 16(1) thereof (*Lassal*, paragraphs 40 and 59).

⁴⁴ Since Ms Dias' third period of residence in the United Kingdom was based solely on the possession of a residence permit issued in accordance with Directive 68/360, the present case therefore makes it necessary to examine whether such residence permits were declaratory in nature or whether they created rights.

⁴⁵ In that regard, Ms Dias submits that a residence permit issued by the government of the host Member State and not withdrawn by it, even though it had the possibility to do so, conferred a right of residence on the person concerned throughout its period of validity. In her view, since Directive 68/360 did not contain any provision equivalent to Article 3 of Directive 90/364, the right of residence recognised under Directive 68/360 and certified by the grant of a residence permit remained in effect until that permit expired or was withdrawn, irrespective of the fact that its holder had ceased to fulfil the conditions necessary for residence.

- 46 By contrast, the United Kingdom and Danish Governments and the European Commission express the view that the residence permit issued under Directive 68/360 was purely declaratory and did not establish any right of residence.
- 47 Ms Dias' contention cannot be accepted.
- 48 As the Court has held on numerous occasions, the right of nationals of a Member State to enter the territory of another Member State and to reside there for the purposes intended by the EC Treaty is a right conferred directly by the Treaty, or, as the case may be, by the provisions adopted for its implementation. The grant of a residence permit to a national of a Member State is to be regarded, not as a measure giving rise to rights, but as a measure by a Member State serving to prove the individual position of a national of another Member State with regard to provisions of European Union law (see Case C-408/03 *Commission v Belgium* [2006] ECR I-2647, paragraphs 62 and 63 and case-law cited).
- 49 Such a declaratory, as opposed to a constitutive, character of residence permits, in regard to rights, has been acknowledged by the Court independently of the fact that the permit in question was issued pursuant to the provisions of Directive 68/360 or Directive 90/364 (see, to that effect, *Commission v Belgium*, paragraph 65).
- 50 It follows that the differences between the provisions of Directives 90/364 and 68/360 cannot justify the contention that, contrary to the principle noted in paragraph 48 of the present judgment, residence permits issued pursuant to Directive 68/360 were capable of establishing rights for their holders.

- 51 In addition, it should be borne in mind that Article 3 of Directive 90/364 referred, not to the permit issued to prove the right of residence, but to the right of residence as such and to the conditions laid down for the grant of that right. Consequently, no conclusion can be drawn from that provision with regard to the nature of the residence permit provided for in Article 2(1) of Directive 90/364, nor, *a fortiori*, with regard to that provided for in Article 4(2) of Directive 68/360.
- 52 In addition, the only provision of Directive 68/360 which referred to the withdrawal of the residence permit, namely Article 7(1) of that directive, confirms the existence of an inherent link between that permit and the citizen's already existing right of residence. Like the right of residence of a worker which, as with the status of worker itself, was not lost solely because its holder was no longer in employment, either because he was temporarily unable to work as a result of illness or accident or because he was involuntarily unemployed, this being duly confirmed by the competent employment office, that provision also did not allow the valid residence permit of a worker who was in such a situation to be withdrawn.
- 53 Finally, it is, admittedly, true that, with regard to the declaratory nature of residence permits, the Court has ruled only in regard to situations in which such a residence permit had not been issued even though the Union citizen concerned fulfilled the conditions governing residence in the host Member State in accordance with European Union law.
- 54 However, as has been pointed out in paragraphs 48 to 52 of the present judgment, the declaratory character of residence permits means that those permits merely certify that a right already exists. Consequently, just as such a declaratory character means that a citizen's residence may not be regarded as illegal, within the meaning of European Union law, solely on the ground that he does not hold a residence permit, it precludes a Union citizen's residence from being regarded as legal, within the meaning of European Union law, solely on the ground that such a permit was validly issued to him.

- 55 Consequently, it must be held that periods of residence completed before 30 April 2006 on the basis solely of a residence permit validly issued under Directive 68/360, without the conditions governing entitlement to any right of residence having been met, cannot be regarded as having been completed legally for the purposes of the acquisition of a right of permanent residence under Article 16(1) of Directive 2004/38.
- 56 In the light of that finding, the questions submitted, as reformulated by the Court in paragraph 41 of the present judgment, make it necessary to examine, second, what effect such periods of residence, completed before 30 April 2006 and after a period of continuous legal residence of five years completed prior to that date, may have on the acquisition of that right of permanent residence.
- 57 In that regard, it must be noted that the right of permanent residence provided for in Article 16 of Directive 2004/38 could be acquired only with effect from 30 April 2006, as stated in paragraph 40 of the present judgment. Consequently, unlike periods of continuous legal residence of five years completed after that date, which confer on citizens of the Union the right of permanent residence with effect from the actual moment at which they are completed, periods completed before that date do not allow those persons to benefit from such a right of residence prior to 30 April 2006.
- 58 Inasmuch as periods of residence of a Union citizen in a host Member State which were completed on the basis solely of a residence permit validly issued under Directive 68/360, but without the conditions governing entitlement to any right of residence having been satisfied, cannot 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, the question then arises as to what the effect is on that acquisition of such a period of residence which occurred before 30 April 2006 and after a period of five years' continuous legal residence already completed prior to that date.

- 59 In that connection, it should be borne in mind, first of all, that the Court has already ruled that Article 16(4) of Directive 2004/38 refers to loss of the right of permanent residence by reason of absences of more than two consecutive years from the host Member State and that such a measure may be justified because, after an absence of that duration, the link with the host Member State is loosened (see *Lassal*, paragraph 55).
- 60 Next, the Court has also held that that provision falls to be applied independently of whether the periods of residence in question were completed before or after 30 April 2006, for the reason that, since residence periods of five years completed before that date must be taken into account for the purpose of acquisition of the right of permanent residence provided for in Article 16(1) of Directive 2004/38, non-application of Article 16(4) thereof to those periods would mean that the Member States would be required to grant that right of permanent residence even in cases of prolonged absences which call into question the link between the person concerned and the host Member State (*Lassal*, paragraph 56).
- 61 Finally, the Court has held that the application of Article 16(4) of Directive 2004/38 to continuous periods of five years' legal residence completed before 30 April 2006 implies, in particular, that absences from the host Member State of less than two consecutive years occurring after those periods but before that date are not such as to affect the link of integration of the Union citizen concerned and, accordingly, those absences are not such as to affect the acquisition of the right of permanent residence pursuant to Article 16(1) of Directive 2004/38 (*Lassal*, paragraphs 57 and 58).
- 62 Such reasoning must also be applied by analogy to periods of residence completed on the basis solely of a residence permit validly issued pursuant to Directive 68/360, without the conditions governing entitlement to any right of residence having been

satisfied, which occurred before 30 April 2006 but after a continuous period of five years' legal residence completed prior to that date.

- 63 Even though Article 16(4) of Directive 2004/38 refers only to absences from the host Member State, the integration link between the person concerned and that Member State is also called into question in the case of a citizen who, while having resided legally for a continuous period of five years, then decides to remain in that Member State without having a right of residence.
- 64 In that regard, it should be noted, as the Advocate General has stated in points 106 and 107 of her Opinion, 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.
- 65 As the situations are comparable, it follows that the rule laid down in Article 16(4) of Directive 2004/38 must also be applied by analogy to periods in the host Member State completed on the basis solely of a residence permit validly issued under Directive 68/360, without the conditions governing entitlement to a right of residence of any kind having been satisfied, which occurred before 30 April 2006 and after a continuous period of five years' legal residence completed prior to that date.
- 66 It follows that periods of less than two consecutive years, completed on the basis solely of a residence permit validly issued pursuant to Directive 68/360, without the conditions governing entitlement to any right of residence having been satisfied, which occurred before 30 April 2006 and after a continuous period of five years' legal

residence completed prior to that date, are not such as to affect the acquisition of the right of permanent residence under Article 16(1) of Directive 2004/38.

⁶⁷ In the light of the foregoing, the answer to the questions referred is that Article 16(1) and (4) of Directive 2004/38 must be interpreted as meaning that:

- periods of residence completed before 30 April 2006 on the basis solely of a residence permit validly issued pursuant to Directive 68/360, without the conditions governing entitlement to any right of residence having been satisfied, cannot 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, and

- periods of residence of less than two consecutive years, completed on the basis solely of a residence permit validly issued pursuant to Directive 68/360, without the conditions governing entitlement to a right of residence having been satisfied, which occurred before 30 April 2006 and after a continuous period of five years' legal residence completed prior to that date, are not such as to affect the acquisition of the right of permanent residence under Article 16(1) of Directive 2004/38.

Costs

⁶⁸ Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

Article 16(1) and (4) 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 before 30 April 2006 on the basis solely of a residence permit validly issued pursuant to Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families, without the conditions governing entitlement to any right of residence having been satisfied, cannot 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, and**

- **periods of residence of less than two consecutive years, completed on the basis solely of a residence permit validly issued pursuant to Directive 68/360, without the conditions governing entitlement to a right of residence having been satisfied, which occurred before 30 April 2006 and after a continuous period of five years' legal residence completed prior to that date, are not such as to affect the acquisition of the right of permanent residence under Article 16(1) of Directive 2004/38.**

[Signatures]