

JUDGMENT OF THE COURT (Grand Chamber)

21 December 2011 *

In Joined Cases C-424/10 and C-425/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Bundesverwaltungsgericht (Germany), made by decision of 13 July 2010, received at the Court on 31 August 2010, in the proceedings

Tomasz Ziolkowski (C-424/10),

Barbara Szeja,

Maria-Magdalena Szeja,

Marlon Szeja (C-425/10)

v

Land Berlin,

* Language of the case: German.

intervening parties:

Vertreter des Bundesinteresses beim Bundesverwaltungsgericht,

THE COURT (Grand Chamber),

composed of V. Skouris, President, J.N. Cunha Rodrigues, K. Lenaerts, J.-C. Bon-
ichot, J. Malenovský and U. Lõhmus, Presidents of Chambers, R. Silva de Lapuerta
(Rapporteur), M. Ilešič, E. Levits, T. von Danwitz and A. Arabadjiev, Judges,

Advocate General: Y. Bot,
Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 13 July 2011,

after considering the observations submitted on behalf of:

— Mr Ziolkowski and Mrs Szeja and her children, by L. Weber, Rechtsanwalt,

— the German Government, by T. Henze and N. Graf Vitzthum, acting as Agents,

— Ireland, by D. O'Hagan, acting as Agent, and B. Doherty, Barrister,

- the Greek Government, by M. Michelogiannaki and T. Papadopoulou, acting as Agents,

- the United Kingdom Government, by S. Ossowski, acting as Agent, and T. Ward, Barrister,

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

after hearing the Opinion of the Advocate General at the sitting on 14 September 2011,

gives the following

Judgment

- ¹ These references for a preliminary ruling concern the interpretation of the right of permanent residence provided for in 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; corrigenda at OJ 2004 L 229, p. 35, and OJ 2005 L 197, p. 34).

- 2 The references were made in two sets of proceedings between Mr Ziolkowski and Mrs Szeja and her two minor children, the applicants in the main proceedings, and the Land Berlin concerning the latter's refusal to issue the applicants with a document certifying that they have a right of permanent residence under Article 16 of Directive 2004/38.

Legal context

European Union law

- 3 Recitals 3, 4, 10, 17, 18 and 29 in the preamble to Directive 2004/38 are worded as follows:

'(3) Union citizenship should be the fundamental status of nationals of the Member States when they exercise their right of free movement and residence. It is therefore necessary to codify and review the existing Community instruments dealing separately with workers, self-employed persons, as well as students and other inactive persons in order to simplify and strengthen the right of free movement and residence of all Union citizens.

(4) With a view to remedying this sector-by-sector, piecemeal approach to the right of free movement and residence and facilitating the exercise of this right, there needs to be a single legislative act to amend Council Regulation (EEC)

No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community [(OJ, English Special Edition 1968 (II), p. 475)], as amended by Council Regulation (EEC) No 2434/92 of 27 July 1992 [(OJ 1992 L 245, p. 1)], and to repeal the following acts: 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)], Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services [(OJ 1973 L 172, p. 14)], Council Directive 90/364/EEC of 28 June 1990 on the right of residence [(OJ 1990 L 180, p. 26)], Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity [(OJ 1990 L 180, p. 28)] and Council Directive 93/96/EEC of 29 October 1993 on the right of residence for students [(OJ 1993 L 317, p. 59)].

...

- (10) Persons exercising their right of residence should not, however, become an unreasonable burden on the social assistance system of the host Member State during an initial period of residence. Therefore, the right of residence for Union citizens and their family members for periods in excess of three months should be subject to conditions.

...

- (17) 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.

- (18) In order to be a genuine vehicle for integration into the society of the host Member State in which the Union citizen resides, the right of permanent residence, once obtained, should not be subject to any conditions.

...

- (29) This Directive should not affect more favourable national provisions.'

- ⁴ Article 1 of Directive 2004/38, entitled 'Subject', which forms part of Chapter I, entitled 'General Provisions', provides as follows:

'This Directive lays down:

- (a) the conditions governing the exercise of the right of free movement and residence within the territory of the Member States by Union citizens and their family members;
- (b) the right of permanent residence in the territory of the Member States for Union citizens and their family members;

...'

5 Chapter III of Directive 2004/38, entitled 'Right of residence', comprises Articles 6 to 15.

6 Article 6, entitled 'Right of residence for up to three months,' provides as follows:

'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.'

7 Article 7 of Directive 2004/38, entitled 'Right of residence for more than three 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(1) shall apply to his/her dependent direct relatives in the ascending lines and those of his/her spouse or registered partner.

- 8 Article 12 of Directive 2004/38, entitled 'Retention of the right of residence by family members in the event of death or departure of the Union citizen,' provides in paragraphs 1 and 2 thereof as follows:

'1. Without prejudice to the second subparagraph, the Union citizen's death or departure from the host Member State shall not affect the right of residence of his/her family members who are nationals of a Member State.

Before acquiring the right of permanent residence, the persons concerned must meet the conditions laid down in points (a), (b), (c) or (d) of Article 7(1).

2. Without prejudice to the second subparagraph, the Union citizen's death shall not entail loss of the right of residence of his/her family members who are not nationals of a Member State and who have been residing in the host Member State as family members for at least one year before the Union citizen's death.

Before acquiring the right of permanent residence, the right of residence of the persons concerned shall remain subject to the requirement that they are able to show that they are workers or self-employed persons or 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 and have comprehensive sickness insurance cover in the host Member State, or that they are members of the family, already constituted in the host Member State, of a person satisfying these requirements. "Sufficient resources" shall be as defined in Article 8(4).

Such family members shall retain their right of residence exclusively on a personal basis.'

- 9 Entitled 'Retention of the right of residence by family members in the event of divorce, annulment of marriage or termination of registered partnership', Article 13 of Directive 2004/38 provides as follows:

'1. Without prejudice to the second subparagraph, divorce, annulment of the Union citizen's marriage or termination of his/her registered partnership, as referred to in point 2(b) of Article 2, shall not affect the right of residence of his/her family members who are nationals of a Member State.

Before acquiring the right of permanent residence, the persons concerned must meet the conditions laid down in points (a), (b), (c) or (d) of Article 7(1).

2. Without prejudice to the second subparagraph, divorce, annulment of marriage or termination of the registered partnership referred to in point 2(b) of Article 2 shall not entail loss of the right of residence of a Union citizen's family members who are not nationals of a Member State where:

...

Before acquiring the right of permanent residence, the right of residence of the persons concerned shall remain subject to the requirement that they are able to show that they are workers or self-employed persons or 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 and have comprehensive sickness insurance cover in the host Member State, or that they are members of the family, already constituted in the host Member State, of a person satisfying these requirements. "Sufficient resources" shall be as defined in Article 8(4).

Such family members shall retain their right of residence exclusively on personal basis.'

¹⁰ Article 14 of Directive 2004/38, entitled 'Retention of the right of residence', is worded as follows:

'1. Union citizens and their family members shall have the right of residence provided for in Article 6, as long as they do not become an unreasonable burden on the social assistance system of the host Member State.

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

In specific cases where there is a reasonable doubt as to whether a Union citizen or his/her family members satisfies the conditions set out in Articles 7, 12 and 13, Member States may verify if these conditions are fulfilled. This verification shall not be carried out systematically.

3. An expulsion measure shall not be the automatic consequence of a Union citizen's or his or her family member's recourse to the social assistance system of the host Member State.

4. By way of derogation from paragraphs 1 and 2 and without prejudice to the provisions of Chapter VI, an expulsion measure may in no case be adopted against Union citizens or their family members if:

(a) the Union citizens are workers or self-employed persons, or

(b) the Union citizens entered the territory of the host Member State in order to seek employment. In this case, the Union citizens and their family members may not be expelled for as long as the Union citizens can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged.'

- 11 Article 16 of Directive 2004/38, entitled 'General rule for Union citizens and their family members', which forms part of Chapter IV thereof, entitled 'Right of permanent residence, is worded 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 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.’

- 12 Article 18 of Directive 2004/38, entitled 'Acquisition of the right of permanent residence by certain family members who are not nationals of a Member State', which also forms part of Chapter IV, provides as follows:

‘Without prejudice to Article 17, the family members of a Union citizen to whom Articles 12(2) and 13(2) apply, who satisfy the conditions laid down therein, shall

acquire the right of permanent residence after residing legally for a period of five consecutive years in the host Member State.’

¹³ Article 37 of Directive 2004/38 provides as follows:

‘The provisions of this Directive shall not affect any laws, regulations or administrative provisions laid down by a Member State which would be more favourable to the persons covered by this Directive.’

National law

¹⁴ Under the heading ‘Right of entry and residence’, Article 2 of the Law on general freedom of movement of Union citizens (Gesetz über die allgemeine Freizügigkeit von Unionsbürgern) of 30 July 2004 (BGBl. 2004 I, p. 1950), as amended by the Law on the transposition of European Union directives relating to residence and asylum law (Gesetz zur Umsetzung aufenthalts- und asylrechtlicher Richtlinien der Europäischen Union) of 19 August 2007 (BGBl 2007 I, p. 1970) (‘the FreizügG/EU’), provides in paragraphs 1 and 2 thereof as follows:

‘(1) Union citizens who enjoy the right of freedom of movement and their family members shall have the right to enter and reside in Federal territory, subject to the provisions of this law.

(2) The following enjoy the right of freedom of movement under Community law:

...

5. Union citizens who are not in employment, subject to the conditions laid down in paragraph 4;

...'

- 15 Article 4 of the FreizügG/EU, entitled 'Persons enjoying the right of freedom of movement who are not in employment,' provides as follows:

'Union citizens who are not in employment and the family members and partners who accompany or join the Union citizen shall enjoy the right under paragraph 2(1) if they have sufficient sickness insurance cover and sufficient resources. ...'

- 16 Article 4a of the FreizügG/EU, entitled 'Right of permanent residence,' provides in paragraph 1 thereof as follows:

'Union citizens, their family members and partners, who have resided legally for a continuous period of five years in federal territory shall enjoy the right of entry and residence, irrespective of the continuing fulfilment of the conditions laid down in paragraph 2(2) (right of permanent residence).'

17 Article 5(6) of the FreizügG/EU provides as follows:

‘Union Citizens shall upon request be provided without delay with a document certifying their right of permanent residence.’

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

18 Mr Ziolkowski is a Polish national who arrived in Germany in September 1989. He obtained a residence permit on humanitarian grounds for the period from July 1991 to April 2006.

19 Mrs Szeja is a Polish national who arrived in Germany in 1988. She obtained a residence permit on humanitarian grounds for the period from May 1990 to October 2005. Her children were born in Germany in 1994 and 1996. They obtained residence permits corresponding to their mother’s permit. The children’s father is a Turkish national who lives separately but has joint custody of the children with Mrs Szeja.

20 In 2005, Mr Ziolkowski and Mrs Szeja, together with her children, requested the Land Berlin to extend their residence permits or, if appropriate, to issue a document certifying their right of permanent residence under European Union law. The request submitted by Mrs Szeja and her children was refused. Mr Ziolkowski’s residence permit was extended until April 2006 but, subsequently, a fresh application for extension was also refused. The persons concerned were all informed that measures may be

adopted requiring their forcible return to their Member State of origin if they did not leave German territory within a certain period following the date on which the decisions of the Land Berlin refusing their requests became definitive.

- 21 According to the Land Berlin, it was not possible to extend the residence permits of the applicants in the main proceedings because they were unable to support themselves economically. Nor was it possible to recognise their entitlement to a right of permanent residence under European Union law, since they were not in employment or able to prove that they could support themselves economically.
- 22 The Verwaltungsgericht (Administrative Court) granted the applications brought before it by the applicants in the main proceedings, finding that the right of permanent residence must be recognised under European Union law in respect of any Union citizen who has resided legally in the host Member State for five years, without there being any need to verify that such a person has sufficient resources. Following the Land Berlin's appeal against the decisions of the Verwaltungsgericht, the Oberverwaltungsgericht Berlin-Brandenburg (Higher Administrative Court, Berlin-Brandenburg) overturned those decisions by judgments of 28 April 2009.
- 23 According to those judgments, only periods completed by the citizen concerned from the date on which that citizen's State of origin became a member of the European Union may be taken into account for the purpose of acquiring the right of permanent residence under European Union law. Moreover, only a period of residence based on Article 2(2) of the FreizügG/EU, which corresponds to Article 7 of Directive 2004/38, may be regarded as lawful for the purpose of acquiring such a right. Since, on the date of accession of their State of origin to the European Union, namely 1 May 2004, the applicants in the main proceedings were not in employment and did not have sufficient resources to support themselves economically so as not to be a burden on the social assistance system of the host Member State, they did not, according to that

court, satisfy the requirements laid down in Article 2(2) of the FreizügG/EU and had therefore not acquired a right of permanent residence within the meaning of Article 4a of that law.

²⁴ The applicants in the main proceedings appealed on a point of law to the referring court against those judgments of the Oberverwaltungsgericht Berlin-Brandenburg.

²⁵ The referring court endorses the finding of the appeal court that the applicants in the main proceedings resided in Germany not in conformity with the conditions laid down by European Union law but on the basis of national law alone. However, it considers that while the right of permanent residence under Article 16(1) of Directive 2004/38 cannot be acquired as a result of such a period of residence, it is nevertheless necessary for it to refer the matter to the Court of Justice before giving its ruling.

²⁶ It is in that context that the Bundesverwaltungsgericht decided to stay the proceedings and to refer to the Court for a preliminary ruling the following questions, which are formulated in the same terms in Case C-424/10 and C-425/10:

‘(1) Is the first sentence of Article 16(1) of Directive 2004/38 to be interpreted as conferring on Union citizens who have resided legally for more than five years in the territory of a Member State on the basis of national law alone, but who did

not during that period fulfil the conditions laid down in Article 7(1) of Directive 2004/38, a right of permanent residence in that Member State?

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

²⁷ By order of the President of the Court of 6 October 2010, Cases C-424/10 and C-425/10 were joined for the purposes of the written and oral procedures and of the judgment.

Consideration of the questions referred

Question 1

²⁸ By its first question, the referring court asks whether Article 16(1) of Directive 2004/38 must be interpreted as meaning that a Union citizen who has been resident in the territory of the host Member State for more than five years on the sole basis of the national law of that Member State must be regarded as having acquired the right of permanent residence under that provision if, during that period of residence, he did not fulfil the conditions laid down in Article 7(1) of the directive.

Observations submitted to the Court

29 According to the applicants in the main proceedings, Union citizens are not required under Article 16(1) of Directive 2004/38 to fulfil the conditions laid down in Article 7(1) of the directive. In order to claim entitlement to the right of permanent residence under Article 16(1), it is sufficient to demonstrate that the period of residence was lawful, even under the law of the host Member State, and the fact that the applicant has had recourse to social assistance or that, during that period of residence, the office responsible for foreign nationals was entitled to find that the applicant no longer had the right of freedom of movement is irrelevant in that regard.

30 All the Member States which have submitted observations and the European Commission consider, as does the referring court, that, in order to acquire the right of permanent residence within the meaning of Article 16(1) of Directive 2004/38, the Union citizen concerned must have resided for a continuous period of five years in compliance with the conditions laid down in Article 7(1) of the directive and that, consequently, a period of residence which does not fulfil those conditions cannot be classified as 'legal residence' for the purpose of Article 16(1).

The Court's reply

31 The first sentence of Article 16(1) of Directive 2004/38 provides that Union citizens who have resided legally for a continuous period of five years in the host Member State have the right of permanent residence there.

- 32 It must be noted, first, that, according to settled case-law, the need for a uniform application of European Union law and the principle of equality require that the terms of a provision of European Union law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an independent and uniform interpretation throughout the European Union (Case C-287/98 *Linster* [2000] ECR I-6917, paragraph 43, and Case C-34/10 *Brüstle* [2011] ECR I-9821, paragraph 25).
- 33 While the wording of that provision of Directive 2004/38 does not give any guidance on how the terms ‘who have resided legally’ in the host Member State are to be understood, the directive does not contain any reference to national laws as regards the meaning of those terms either. It follows that those terms must be regarded, for the purposes of application of the directive, as designating an autonomous concept of European Union law which must be interpreted in a uniform manner throughout the Member States.
- 34 It must be borne in mind that the meaning and scope of terms for which European Union law provides no definition must be determined by considering, inter alia, the context in which they occur and the purposes of the rules of which they form part (see, inter alia, Case C-336/03 *easyCar* [2005] ECR I-1947, paragraph 21; Case C-549/07 *Wallentin-Hermann* [2008] ECR I-11061, paragraph 17; Case C-151/09 *UGT-FSP* [2010] ECR I-7591, paragraph 39; and *Brüstle*, paragraph 31).
- 35 Thus, with regard, first, to the purposes of Directive 2004/38, recital 1 in the preamble states that citizenship of the Union confers on each Union citizen a primary and individual right to move and reside freely within the territory of the Member States, subject to the limitations and restrictions laid down by the Treaties and the measures adopted for their implementation (see Case C-162/09 *Lassal* [2010] ECR I-9217, paragraph 29, and Case C-434/09 *McCarthy* [2011] ECR I-3375, paragraph 27).

36 Whilst it is true that Directive 2004/38 aims to facilitate and strengthen the exercise of the primary and individual right to move and reside freely within the territory of the Member States that is conferred directly on each citizen of the Union, the fact remains that the subject of the directive concerns, as is apparent from Article 1(a) and (b), the conditions governing the exercise of that right and the right of permanent residence, the latter having been introduced into the legal order of the European Union for the first time by that directive, except as regards workers who have stopped working in the host Member State and their family members.

37 It is apparent from recitals 3 and 4 in the preamble to Directive 2004/38 that the aim of the directive is to remedy the sector-by-sector piecemeal approach to the right of freedom of movement and residence in order to facilitate the exercise of this right by providing a single legislative act codifying and revising the instruments of European Union law which preceded the directive.

38 Next, with regard to the overall context of Directive 2004/38, it should be noted that the directive introduced a gradual system as regards the right of residence in the host Member State, which reproduces, in essence, the stages and conditions set out in the various instruments of European Union law and case-law preceding the directive and culminates in the right of permanent residence.

39 First, for periods of residence of up to three months, Article 6 of Directive 2004/38 limits the conditions and formalities of the right of residence to the requirement to hold a valid identity card or passport and, under Article 14(1) of the directive, that right is retained as long as the Union citizen and his family members do not become an unreasonable burden on the social assistance system of the host Member State.

- 40 Second, for periods of residence of longer than three months, the right of residence is subject to the conditions set out in Article 7(1) of Directive 2004/38 and, under Article 14(2), that right is retained only if the Union citizen and his family members satisfy those conditions. It is apparent from recital 10 in the preamble to the directive in particular that those conditions are intended, inter alia, to prevent such persons becoming an unreasonable burden on the social assistance system of the host Member State.
- 41 Third, it is apparent from Article 16(1) of Directive 2004/38 that Union citizens acquire the right of permanent residence after residing legally for a continuous period of five years in the host Member State and that that right is not subject to the conditions referred to in the preceding paragraph. As stated in recital 18 in the preamble to the directive, once obtained, the right of permanent residence should not be subject to any further conditions, with the aim of it being a genuine vehicle for integration into the society of that State.
- 42 Lastly, with regard to the right of permanent residence viewed in the specific context of Directive 2004/38, recital 17 in the preamble thereto states that such a right of should be laid down for all Union citizens and their family members who have resided in the host Member State ‘in compliance with the conditions laid down in this Directive’ during a continuous period of five years without becoming subject to an expulsion measure.
- 43 That clarification was inserted into that recital during the legislative process that led to the adoption of Directive 2004/38 by Common Position (EC) No 6/2004, adopted by the Council of the European Union on 5 December 2003 (OJ 2004 C 54 E, p. 12). According to the Communication to the European Parliament of 30 December 2003 (SEC/2003/1293 final), that clarification was inserted ‘in order to clarify the content of the term “legal residence” for the purpose of Article 16(1) of the directive.

44 Moreover, Article 18 of Directive 2004/38, which forms part of the same Chapter as Article 16 and concerns the acquisition of the right of permanent residence by the family members of a Union citizen who are not nationals of a Member State, provides that, in the event of death or departure of the citizen, divorce, annulment of marriage or termination of a registered partnership, those members must, in the same way as is provided for in Article 16(1), have ‘resided legally’ for a period of five consecutive years in the host Member State in order to acquire the right of permanent residence and refers in that regard to Articles 12(2) and 13(2) of the directive, the second subparagraphs of which require, among other conditions, that the persons concerned are themselves able to show, before acquiring such a right, that they satisfy the same conditions as those set out in Article 7(1)(a) (b) or (d) of the directive.

45 Similarly, under Articles 12(1) and 13(1) of Directive 2004/38, while the death or departure of the Union citizen or divorce, annulment of marriage or termination of a registered partnership do not affect the right of residence of that citizen’s family members who are nationals of a Member State, those family members must also show that they satisfy the conditions set out in Article 7(1) of the directive before acquiring the right of permanent residence.

46 It follows that the concept of legal residence implied by the terms ‘have resided legally’ in Article 16(1) of Directive 2004/38 should be construed as meaning a period of residence which complies with the conditions laid down in the directive, in particular those set out in Article 7(1).

47 Consequently, a period of residence which complies with the law of a Member State but does not satisfy the conditions laid down in Article 7(1) of Directive 2004/38 cannot be regarded as a ‘legal’ period of residence within the meaning of Article 16(1).

- 48 There is no valid basis for a contrary interpretation derived from Article 37 of Directive 2004/38, which states that the provisions of the directive are not to affect any laws, regulations or administrative provisions laid down by a Member State which would be more favourable to the persons covered by the directive.
- 49 The fact that national provisions concerning the right of residence of Union citizens that are more favourable than those laid down in Directive 2004/38 are not to be affected does not in any way mean that such provisions must be incorporated into the system introduced by the directive.
- 50 Article 37 of Directive 2004/38 simply provides that the directive does not preclude the laws of the Member States from introducing a system that is more favourable than that established by the directive. However, it is for each Member State to decide not only whether it will adopt such a system but also the conditions and effects of that system, in particular as regards the legal consequences of a right of residence granted on the basis of national law alone.
- 51 In the light of the foregoing, the answer to Question 1 is that Article 16(1) of Directive 2004/38 must be interpreted as meaning that a Union citizen who has been resident for more than five years in the territory of the host Member State on the sole basis of the national law of that Member State cannot be regarded as having acquired the right of permanent residence under that provision if, during that period of residence, he did not satisfy the conditions laid down in Article 7(1) of the directive.

Question 2

- 52 By its second question, the referring court asks whether the periods of residence completed by a national of a non-Member State in the territory of a Member State before the accession of that non-Member State to the European Union must, in the absence of specific provisions in the act of accession, be taken into account for the purposes of the acquisition of the right of permanent residence under Article 16(1) of Directive 2004/38.

Observations submitted to the Court

- 53 Ireland and the Commission are of the view that it is unnecessary to answer the second question referred by the national court because it is common ground that the applicants in the main proceedings never satisfied the conditions laid down in Article 7(1) of Directive 2004/38, including during the periods of residence prior to the accession of the State of origin to the European Union.
- 54 The German and United Kingdom Governments consider that periods of residence prior to the accession of the State of origin of the citizen concerned to the European Union cannot be taken into account for the purposes of the acquisition of the right of permanent residence under Article 16(1) of Directive 2004/38, since that right of residence requires the person claiming entitlement to it to have resided as a Union citizen, whereas, prior to the accession of the Republic of Poland to the European Union, the applicants in the main proceedings were not Union citizens and, therefore, did not enjoy the rights conferred by the legal instruments of the European Union either.

55 On the other hand, the Greek Government takes the view that it is apparent from the wording, purpose and general scheme of Article 16(1) of Directive 2004/38 that that provision must be applied irrespective of the date of accession of the State of origin of the citizen concerned to the European Union. Consequently, account should be taken of periods of residence completed before the accession, provided they satisfy the conditions laid down in the directive.

The Court's reply

56 It must be observed at the outset that the Act of Accession of a new Member State is based essentially on the general principle that the provisions of European Union law apply *ab initio* and *in toto* to that State, derogations being allowed only in so far as they are expressly laid down by transitional provisions (see Case 420/07 *Apostolides* [2009] ECR I-3571, paragraph 33 and the case-law cited).

57 Thus, with regard to Article 6 of the EEC Treaty (now Article 6 of the EC Treaty, which became, after amendment, Article 12 EC) and Articles 48 and 51 of the EC Treaty (now, after amendment, Articles 39 EC and 42 EC, respectively), the Court has had occasion to hold that where the Act concerning the conditions of accession of a Member State contains no transitional provisions concerning the application of those articles, they must be considered to be immediately applicable and binding as regards that Member State as from the date of its accession to the European Union, and, since that date, they may therefore be relied on by nationals from any Member State and be applied to the present and future effects of situations arising before the accession of that State to the European Union (Case C-122/96 *Saldanha and MTS* [1997] ECR I-5325, paragraph 14; Case C-195/98 *Österreichischer Gewerkschaftsbund* [2000] ECR I-10497, paragraph 55; and Case C-290/00 *Duchon* [2002] ECR I-3567, paragraph 44).

- 58 Furthermore, the Court has also held that the provisions on citizenship of the European Union are applicable as soon as they enter into force and must therefore be applied to the present effects of situations arising previously (see Case C-224/98 *D'Hoop* [2002] ECR I-6191, paragraph 25, and *Lassal*, paragraph 39).
- 59 In the present case, there is no transitional provision concerning the application to the Republic of Poland of the European Union legal provisions on freedom of movement of persons in the Act concerning the conditions of accession to the European Union of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded (OJ 2003 L 236, p. 33), except for certain transitional provisions concerning freedom of movement for workers and freedom to provide services in the Annexes to that act.
- 60 Consequently, the provisions of Article 16(1) of Directive 2004/38 can be relied by Union citizens and be applied to the present and future effects of situations arising before the accession of the Republic of Poland to the European Union.
- 61 It is, admittedly, true that the periods of residence completed in the territory of the host Member State by a national of another State before the accession of the latter State to the European Union fell not within the scope of European Union law but solely within the law of the host Member State.
- 62 However, provided the person concerned can demonstrate that such periods were completed in compliance with the conditions laid down in Article 7(1) of Directive 2004/38, the taking into account of such periods from the date of accession of the

Member State concerned to the European Union does not give retroactive effect to Article 16 of Directive 2004/38, but simply gives present effect to situations which arose before the date of transposition of that directive (see *Lassal*, paragraph 38).

- ⁶³ In the light of the foregoing considerations, the answer to Question 2 is that periods of residence completed by a national of a non-Member State in the territory of a Member State before the accession of the non-Member State to the European Union must, in the absence of specific provisions in the Act of Accession, be taken into account for the purpose of the acquisition of the right of permanent residence under Article 16(1) of Directive 2004/38, provided those periods were completed in compliance with the conditions laid down in Article 7(1) of the directive.

Costs

- ⁶⁴ 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 (Grand Chamber) hereby rules:

- 1. Article 16(1) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, amending Regulation (EEC) No 1612/68 and repealing Directives**

64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, must be interpreted as meaning that a Union citizen who has been resident for more than five years in the territory of the host Member State on the sole basis of the national law of that Member State cannot be regarded as having acquired the right of permanent residence under that provision if, during that period of residence, he did not satisfy the conditions laid down in Article 7(1) of the directive.

- 2. Periods of residence completed by a national of a non-Member State in the territory of a Member State before the accession of the non-Member State to the European Union must, in the absence of specific provisions in the Act of Accession, be taken into account for the purpose of the acquisition of the right of permanent residence under Article 16(1) of Directive 2004/38, provided those periods were completed in compliance with the conditions laid down in Article 7(1) of the directive.**

[Signatures]